Supreme Court, U.S.
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In The
Supreme Court of the United States

R.M.S. TITANIC, INCORPORATED, successor in interest to Titanic Ventures, limited partnership,

Petitioner,

v.

CHRISTOPHER S. HAVER; DEEP OCEAN EXPEDITIONS,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petition for Writ of Certiorari

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QUESTIONS PRESENTED

1. WHETHER THE FOURTH CIRCUIT ERRED WHEN IT LIMITED FEDERAL ADMIRALTY *IN REM* JURISDICTION TO PARTIES WHO VOLUNTARILY APPEARED BEFORE IT, IN DISREGARD OF SUPREME COURT PRECEDENT AND THE ALL WRITS ACT.

2. WHETHER THE FOURTH CIRCUIT ERRED BY REVERSING THE DISTRICT COURT'S HOLDING THAT ACCESS TO SHIPWRECK FOR SIGHTSEEING AND PHOTOGRAPHY COULD BE RESTRICTED IN ORDER TO PROTECT THE SALVOR'S EFFORTS TO SALVAGE IN A MANNER PROTECTIVE OF THE WRECK'S HISTORICAL AND CULTURAL SIGNIFICANCE.

PARTIES TO THE PROCEEDING

All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

Petitioners: R.M.S. Titanic, Inc. was aligned as plaintiff/appellee below. It is a Florida corporation, and has no parent companies or non-wholly owned subsidiaries.

Respondents: Christopher S. Haver was aligned as a defendant/appellant below. Deep Ocean Expeditions was aligned as defendant/appellant below, although it did not participate in the proceedings before the district court. The wreck of the vessel *RMS TITANIC* was aligned as a defendant below, and it continues as the named vessel in this proceeding. Liverpool and London Steamship Protection and Indemnity Association Limited was aligned as a claimant in the proceedings below, but its claim was dismissed with prejudice by an agreed dismissal order entered in the district court on June 7, 1994. Wildwings Worldwide Travel, Bakers World Travel, Quark Expeditions, Inc., Mike McDowell, Ralph White, Don Walsh, Alfred S. McLaren, *R/V AKADEMIK MSTISLAV KELDYSH*, and Blackhawk Television were all aligned as defendants named in the injunctions issued by the district court, but they did not participate in the current (1998-1999) district court or appellate court proceedings. They were aligned as parties in interest in the appellate court. John A. Joslyn was aligned as a movant in the district court proceedings in 1996, but he did not participate in the 1998 proceedings in the district court that led to this appeal.

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Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The order appearing at App. 1 contains corrections issued by the United States Court of Appeals for the Fourth Circuit to eliminate minor citation errors in its opinion of March 24, 1999. The March 24, 1999 opinion of the Fourth Circuit appears at App. 2 to the petition and is reported at 171 F.3d 943 (4th Cir. 1999). The opinion of the United States District Court appears at App. 45 to the petition and is reported at 9 F.Supp.2d 624 (E.D.Va. 1998). Earlier opinions in the case, which are also relevant to the proceedings, appear at App. 82 and 87, and are reported at 1996 A.M.C. 2497 (E.D.Va. 1996) and 924 F.Supp. 714 (E.D.Va. 1996) respectively.

JURISDICTION

The Opinion of the United States Court of Appeals for the Fourth Circuit was issued on March 24, 1999. No petition for rehearing was filed in this case. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const., Art. III, § 2

> The judicial Power shall extend ... to all Cases of admiralty and maritime Jurisdiction ....

The All Writs Act, 28 U.S.C. § 1651(a)

> The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

The Judiciary Act of 1789 (current version), 28 U.S.C. § 1333

> The district courts shall have original jurisdiction, exclusive of the courts of the States, of:
>
> (1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.

STATEMENT OF THE CASE

The *RMS TITANIC* sank during her maiden voyage on April 15, 1912 and lay undiscovered in 12,500 feet of water on the floor of the North Atlantic, approximately 400 miles off the coast of Newfoundland, until September 1, 1985. App. 4. The wreck lies in total darkness in two sections, surrounded by a debris field littered with wreckage and cargo. App. 84. The water pressure at the wreck site is in excess of 6,000 pounds per square inch. Salvage must be conducted by use of a manned submersible.

The petitioner, R.M.S. Titanic, Inc. ("RMST"), is the salvor-in-possession of the *RMS TITANIC*, having conducted extensive salvage operations during expeditions to the wreck site in the years 1987, 1993, 1994, 1996, and 1998. App. 49, 47. RMST is the only entity that has conducted salvage operations at the wreck since its discovery. Having salvaged, conserved and restored numerous artifacts which it has exhibited in venues throughout the world, RMST has been committed to keeping its TITANIC artifacts together as a collection for public exhibition, without sale of individual artifacts to private collectors. App. 51, 70. In recognition of this policy, the district court commended RMST for its salvage of the wreck and for "maximizing the wreck's historical value, and returning the wreck's artifacts to society for the general use and education of all mankind." App. 78. The district court therefore concluded that "it is in the public interest for RMST to continue its operation unhindered." App. 78.

In the summer of 1987, RMST conducted the first salvage of the wreck site, recovering approximately 1,800 artifacts. App. 7. On August 26, 1993 RMST filed a verified complaint in the district court seeking a declaration that it was the sole and exclusive salvor of the wreck, with the right exclusively to salvage the wreck, as well as an injunction to prevent others from interfering with the

exercise of its salvage rights.[1] App. 7. RMST presented a salvaged artifact to the district court and committed to recover and return additional salvage from the wreck to the district court. App. 7. On August 27, 1993 the district court issued an Order for Issuance of Warrant of Arrest, which was published in accordance with the local rules of the court. App. 7. Liverpool and London Steamship Protection and Indemnity Association filed a claim asserting an interest in the wreck. That claim was dismissed with prejudice on June 7, 1994, and on that date the district court, exercising constructive *in rem* jurisdiction over the wreck and wreck site based upon the presence of salvaged artifacts within the district, awarded exclusive salvage rights, as well as ownership of recovered artifacts, to RMST. App. 7-8. RMST then conducted another salvage expedition in July of 1994.[2]

In 1996, a rival who proposed to initiate salvage, John A. Joslyn ("Joslyn"), filed a motion challenging RMST's status as exclusive salvor of the wreck. App. 47. After an evidentiary hearing, the district court issued an opinion rejecting Joslyn's challenge. App. 87. Joslyn subsequently modified his planned salvage expedition, stating that he merely intended to visit and photograph the wreck during and after RMST's 1996 summer salvage expedition. App. 48. On August 13, 1996 the district court entered an injunction prohibiting certain specified individuals (including Joslyn and the *R/V AKADEMIK*

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[1] A previous action was filed in the district court in 1992, but the district court's judgment was reversed by the court of appeals, making it necessary to re-file the salvage action. *See Marex Titanic, Inc. v. The Wrecked and Abandoned Vessel*, 805 F.Supp. 375 (E.D.Va., 1992), *rev'd* 2 F.3d 544 (4th Cir. 1993). By the time the court of appeals reversed the district court opinion, RMST had completed another salvage expedition to the wreck site in the summer of 1993.

[2] Salvage operations are only conducted during the summer months because sea conditions in the North Atlantic are dangerous outside of that "weather window." App. 49-50.

KELDYSH) and anyone with notice of its Order from interfering with RMST's salvage activities at the wreck site. App. 48-49, 83. In its August 13, 1996 order, the district court declared that RMST's rights as salvor-in-possession included the sole and exclusive right to photograph the wreck, citing the fact that RMST was not selling salvaged artifacts and needed to license and sell video documentary rights in order to finance what the district court found to be responsible salvage conducted in a manner appropriate to the historical significance of the wreck. App. 85-86. This order was issued prior to the conclusion of RMST's 1996 salvage expedition.

In 1998 RMST learned that a commercial venture had been planned to provide members of the public with transportation to the wreck site and the opportunity to dive and photograph the wreck for $32,500.00 per person. App. 9. The venture, known as "Operation Titanic," was planned by Deep Ocean Expeditions ("DOE") and promoted on an international basis by various travel agencies.[3] The promoters of "Operation Titanic" advertised that the Russian salvage vessel *R/V AKADEMIK KELDYSH* and its submersibles would be employed to transport participants to the wreck site. App. 9. RMST sought a new injunction to prevent this venture from occurring. On May 4, 1998, Christopher S. Haver ("Haver") filed a separate *in personam* action against RMST seeking a declaratory judgment that he had the right to enter the wreck site and photograph the wreck. The district court subsequently consolidated Haver's declaratory judgment action with and into the *in rem* salvage action. App. 9-10. On June 23, 1998 the district court reaffirmed, "personalized and enforced" the 1996 injunction against the new parties. App. 5. The district court enjoined

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[3] DOE was founded by Mike McDowell. Travel agencies who undertook to sell tickets included Quark Expeditions, Incorporated, WildWings Worldwide Travel, and Bakers World Travel. Individuals indentified as participants and/or leaders included Alfred S. McLaren, Ralph White and Don Walsh.

Haver, an Arizona resident, and DOE, a British Virgin Islands corporation, as well as others, from:

> (i)interfering with the rights of [RMST], as salvor in possession of the wreck and wreck site of the *R.M.S. Titanic*, to exclusively exploit the wreck and wreck site, (ii) conducting search, survey, or salvage operations of the wreck or wreck site, (iii) obtaining any image, video, or photograph of the wreck or wreck site, and (iv) entering or causing anyone or anything to enter the wreck or wreck site with the intention of performing any of the foregoing acts.

App. 5. The district court also found that it was necessary to provide RMST with exclusive rights to the images of the wreck, as follows:

> [I]f R.M.S. TITANIC is not selling artifacts like traditional salvors, it must be given the rights to other means of obtaining income. The court finds that in a case such as this, allowing another "salvor" to take photographs of the wreck and wreck site is akin to allowing another salvor to physically invade the wreck and take artifacts themselves.

App. 41.

Haver and DOE appealed the district court decision to the United States Court of Appeals for the Fourth Circuit. The court of appeals affirmed the district court's exercise of jurisdiction over the wreck and wreck site, but reversed certain portions of the injunction. App. 44. The opinion of the court of appeals contained the following statement:

> [w]e believe that the district court has a "constructive" – to use the district court's term – *in rem* jurisdiction over the wreck of the *Titanic* by having a portion of it within its jurisdiction and that this constructive *in rem* jurisdiction continues as long as the salvage operation continues. We hasten to add that as we use the term "constructive," we mean an "imperfect" or "inchoate" *in rem* jurisdiction which falls short of giving the court sovereignty over the wreck. It represents rather a "shared sovereignty," shared with other nations enforcing the same *jus gentium*. Through this mechanism, internationally recognized rights may be legally declared but not finally enforced. Final enforcement requires the additional steps of bringing either property or persons involved before the district court or a court in admiralty of another nation.

App. 37-38. Therefore, the court of appeals refused to enjoin persons or entities not personally before the district court, stating that "[i]njunctive relief, by its very nature, can only be granted in an *in personam* action commenced by one party against another." App. 17. The court of appeals determined that the district court could exercise personal jurisdiction over Haver because he voluntarily submitted himself to the court's jurisdiction, but lacked personal jurisdiction over DOE (a foreign entity), despite the fact that DOE had notice of the injunction. App. 16-20. The court of appeals also determined that the district court "erred in extending the law of salvage to vest in RMST exclusive rights to visit, view, and photograph the wreck and wreck site of the *Titanic* at its location in international waters." App. 43. Accordingly, the court of appeals affirmed in part,

reversed in part, and remanded the case to the district court for revisions in the injunction. App. 44.

REASONS FOR GRANTING THE PETITION

In its opinion, the court of appeals framed the issue under consideration as follows: "[t]his appeal presents questions about the authority of a United States court to regulate the salvage rights in the wreck of the luxury liner, *R.M.S. Titanic*, which lies in international waters." App. 4. In answering those questions, the court of appeals disregarded precedent of this Court and the All Writs Act, 28 U.S.C. § 1651(a), and significantly constricted the jurisdiction of federal courts to address admiralty matters. By improperly limiting remedies available in admiralty, the court of appeals is forcing RMST to pursue, in forums all over the world, those who jeopardize its rights as salvor-in-possession. App. 32.

The ruling by the court of appeals conflicts directly with precedent of this Court specifically endorsing *in rem* injunctions. The court of appeals erred when it failed to properly apply the law by affirming the district court's *in rem* injunction, and this error increased the likelihood of conflict on the high seas. In addition, because the court of appeals failed to affirm the district court's *in rem* injunction pursuant to the authority of the All Writs Act, it increased the current threat of conflict between rival salvors and others competing for access to the wreck. Because the opinion of the court of appeals totally disregards this Court's precedent and the All Writs Act, frequent, and potentially disastrous, international incidents of violence on the high seas will most certainly occur, both at this wreck site and at numerous other sites around the world where rival salvors jockey for access and control of valuable salvage. Additionally, this fundamental misreading of admiralty jurisdiction has a significant effect within the Fourth Circuit, which includes several states along the east coast of the United States.

In addition to its disregard of Supreme Court precedent and federal statutory law, the ruling by the court of appeals that other persons cannot be denied access to the wreck site, represents an unreasonable failure to apply existing legal principles in response to circumstances created by emerging technology. With the advent of technological advances, the ability to reach shipwrecks on the ocean floor in international waters is greatly enhanced. Because these wrecks, located at great depths and under great pressure in total darkness, are more and more accessible, policy questions never before faced by U.S. courts must be confronted. The district court ruling, and the public policy of the United States, encourages the protection of shipwrecks of historic significance. The district court ruling conforms to the contours of internationally recognized principles of salvage law. It brings order to salvage activities involving shipwrecks in international waters by allowing courts to exercise jurisdiction to prevent a free-for-all at the wreck site. In contrast, the ruling of the court of appeals leaves a gaping hole in that policy which will encourage lawlessness and anarchy on the high seas. The potential for conflict in this arena takes on added significance because three sovereign nations, the United States, France, and Russia, own and operate the surface vessels and submersibles used to date to visit the wreck in its dark and forbidding location.

The ruling of the court of appeals creates the risk that the salvage of historic wrecks will be conducted in an irresponsible manner. By denying the district court's efforts to preserve the economic incentive presently available to the salvor of an historic wreck, the court of appeals took from the district court the flexibility necessary to ensure that salvage will be conducted in a manner consistent with the historical and archaeological significance of the wreck. If salvors of historic wrecks are unable to control access by those who view and photograph, but can only do so by encroaching on the wreck, they will lose the exclusive right to exploit the wreck. Such a loss of economic rights could

force a salvor to compromise the integrity of the collection of artifacts salvaged from the wreck by selling individual artifacts. The district court determined that RMST's decision to maintain the artifacts together in a museum collection was more desirable than selling them individually on the open market and sought to affirm the economic incentive that supports this decision. The revenue generated by the right to control visual access allows salvors of historic wrecks to preserve the collection for exhibition, and serves to sustain historically appropriate salvage activities, laudable goals. The court of appeals' opinion prevents achievement of those goals.

I. THE FOURTH CIRCUIT'S OPINION CONFLICTS WITH SUPREME COURT PRECEDENT AND STATUTE

A district court must have power to enjoin interlopers from interfering with the salvage rights bestowed upon worthy salvors by the court. It is a hollow order that awards exclusive salvage rights over a shipwreck in international waters, but then fails to provide the teeth for enforcing the order.[4] The opinion of the court of appeals significantly constricts the jurisdiction of federal admiralty courts and constitutes a fundamental misreading of admiralty jurisdiction. Such a fundamental misreading requires a correction. It is a fundamental principle of admiralty law that a salvor has a right to retain possession of the res until its salvage is completed and "no other person can interfere against them forcibly." *The John Gilpin*, Olcott 77, 13 F.Cas. 675, 676, No. 7345 (S.D.N.Y. 1845); *The Henry Ewbank*, 1 Sumn. 400, 11 F.Cas. 1166, 1170-71, No. 6376 (C.C.D.Mass. 1833) (Story, J, stating that "[n]o other persons, without [the first salvor's] consent, could intrude

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[4] The expedition enjoined by the district court took place in September, 1998 in violation of the district court's order. App. 13.

themselves upon that possession, or gain a title to be deemed co-salvors"). The opinion of the court of appeals dilutes the commonly-accepted control over the wreck by the salvor-in-possession, and ends the unfettered access necessary for a salvor-in-possession to properly salvage the wreck and exploit the res.

a. Supreme Court Precedent

This Court has recognized that lack of control over a res creates a significant problem for a court tasked with adjudicating rights to such res. The Court has addressed this problem by approving, on two alternative grounds, the use of an *in rem* injunction to prevent interference by non-parties.

1. interference with *in rem* custody

In *Washington v. Washington State*, 443 U.S. 658, 99 S.Ct. 3055, 61 L.Ed.2d 823 (1979), this Court interpreted a series of treaties between the United States and certain tribes of Native Americans. The United States sought an injunction to require the State of Washington to protect the Native Americans' share of fishing rights. On appeal, several commercial fishing associations argued that the district court had no power to enjoin individual non-treaty fishermen, who were not parties to its decisions, from violating the allocations ordered by the district court. *Washington*, 443 U.S. at 693 f.n. 32, 99 S.Ct. at 3078 f.n. 32. The commercial fishing associations argued that they should not be bound by these orders because they were not parties to the proceedings that led to their issuance.

This Court rejected the arguments of the commercial fishermen and stated that "a court possessed of the res in a proceeding *in rem*, such as one to apportion a fishery, may enjoin those who would interfere with that custody." *Id.* However, in the opinion under consideration, the court of appeals ignored the precedent of this Court and stated,

without citing any authority, that "injunctive relief, by its very nature, can only be granted in an *in personam* action ...." App. at 17. This Court's ruling in *Washington* and the court of appeals ruling in the opinion under consideration cannot be reconciled. The practical effect of the ruling by the court of appeals in this case will be to deny a district court entertaining a salvage action the means to prevent an interloper from interfering with the salvage rights the court has bestowed. This is precisely the kind of situation the Court sought to avoid in *Washington*, 443 U.S. at 693 f.n. 32.

2. interference with public rights

This Court stated in *Washington*, 443 U.S. at 693 f.n. 32 that there was an alternative ground for subjecting the commercial fishermen to the injunction. The Court stated that non-parties to an injunction can also be bound by the "rule that nonparties who interfere with the implementation of court orders establishing public rights may be enjoined, *e.g. United States v. Hall*, 472 F.2d 261 (CA5 1972)."[5] In *Hall*, the court of appeals framed the issue before it as follows: "[t]his case presents the question whether a district court has power to punish for criminal contempt a person who, though not a party nor bearing any legal relationship to a party, violates a court order designed to protect the court's judgment in a school desegregation case." *Hall*, 472 F.2d at 262. The *Hall* court stated that:

> The principle that courts have jurisdiction to punish for contempt in order to protect their ability to render judgment is also found in the

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[5] This Court cited *Hall*, 472 F.2d 261 (5th Cir. 1972), with approval in *Golden State Bottling Co. v. NLRB*, 414 U.S. 168, 180, 94 S.Ct. 414, 38 L.Ed.2d 388 (1973)(recognizing that courts frequently go much further to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved).

> use of in rem injunctions. Federal courts have issued injunctions binding on all persons, regardless of notice, who come into contact with property which is the subject of a judicial decree. (citations omitted). A court entering a decree binding on a particular piece of property is necessarily faced with the danger that its judgment may be disrupted in the future by members of an undefinable class – those who may come into contact with the property. The in rem injunction protects the court's judgment. The district court here faced an analogous problem. The judgment in a school case, as in other civil rights actions, inures to the benefit of a large class of persons, regardless of whether the original action is cast in the form of a class action. (citations omitted).

Id. at 266.

Consistent with *Hall*, the district court entered a decree binding upon a particular piece of property (the wreck) and was therefore faced with the danger that its judgment might be disrupted in the future by members of an undefinable class – those who may come into contact with the wreck.[6] Furthermore, the district court specifically found that RMST's salvage activities "maximiz[ed] the wreck's historical value, and return[ed] the wreck's artifacts to society **for the general use and education of all mankind**." (emphasis added). App. 78. The opinion of the

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[6] It is not contended by RMST that the court, by virtue of exercising constructive *in rem* jurisdiction over the wreck and wreck site in order to protect the exercise of the salvor's rights, has exerted territorial sovereignty. The salvor's right to exploit the wreck and to prevent others from interfering with exclusive exploitation activities does not rise to the level of an exercise of territorial sovereignty.

court of appeals ignores this public interest and disregards this Court's jurisprudence by holding that a district court cannot issue an injunction in a salvage action in order to prevent third parties from interfering with salvage efforts of the exclusive salvor.

3. application of precedent

This line of cases was applied by another district court in a salvage action. In the case of *Zych v. SB LADY ELGIN*, 1991 WL 34714, 1991 U.S.Dist. LEXIS 2962 (N.D.Ill. 1991), *vacated on other grounds*, 960 F.2d 665 (7th Cir.), *cert denied*, 506 U.S. 985, 113 S.Ct. 491, 121 L.Ed.2d 430 (1992), the court continued to exercise jurisdiction over the salvor after it named him salvor-in-possession of the wreck. When the salvor notified the court that others were interfering with his salvage rights and sought an injunction, the court granted the *in rem* injunction. *Zych*, 1991 WL 34714, *3. As the *Hall* court noted, Fed.R.Civ.P. "65(d), as a codification rather than a limitation of courts' common-law powers, cannot be read to restrict the inherent power of a court to protect its ability to render a binding judgment." *Hall*, 472 F.2d at 267. This inherent power was recognized by the *Zych* court, citing *Hall*, and formed the basis for its issuance of an *in rem* injunction preventing unknown third parties from interfering with Zych's exclusive right to conduct salvage operations.

The district court in this case did the same thing. It issued an *in rem* injunction in order to protect the salvor-in-possession from interference with its rights. However, the court of appeals decision in this case impairs the ability of the salvor to obtain protection from rivals who would interfere with its rights.

b. Statute

The All Writs Act, 28 U.S.C. § 1651, provides that: "[t]he Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." This Court held in *Adams v. United States ex rel. McCann*, 317 U.S. 269, 273, 63 S.Ct. 236, 238, 87 L.Ed. 268 (1942) that "a federal court may avail itself of all auxiliary writs as aids in the performance of its duties, when the use of such historic aids is calculated in its sound judgment to achieve the ends of justice entrusted to it." The All Writs Act permits district courts, in order to achieve the ends of justice, to issue orders binding non-parties when the orders are necessary to preserve and carry into effect the district court's jurisdiction. *In re Baldwin United Corporation*, 770 F.2d 328, 333, 338-9 (2nd Cir. 1985); *see also Kemp v. Peterson*, 940 F.2d 110, 112 (4th Cir. 1991); *NAACP v. Brock*, 619 F.Supp. 846, 852 (D.D.C. 1985).

The power conferred by the All Writs Act extends to persons who, though not parties to the original action or engaged in wrongdoing, are in a position to frustrate the implementation of a court order or the proper administration of justice, and the Act encompasses even those who have not taken any affirmative action to hinder justice. *United States v. New York Tel. Co.*, 434 U.S. 159, 174, 98 S.Ct. 364, 373, 54 L.Ed.2d 376 (1977). In *NAACP* the district court specifically determined that it was appropriate to "issue injunctions against certain nonparties" and that such nonparties were subject to the court's personal jurisdiction even if they were not subject to service pursuant to Fed.R.Civ. P. 4 and 71. *NAACP*, 619 F.Supp. at 852. The *NAACP* court recognized that even where non-parties are not subject to service pursuant to Fed.R.Civ.P. 4, "jurisdiction is still proper under the precedent established by the court of appeals in *Environmental Defense Fund v. EPA*, 485 F.2d 780 (D.C.Cir. 1973) ...." *Id.* The *EPA* court had applied the

All Writs Act and stated that "[n]onparties to a litigation can be bound by a temporary restraining order without formal service, with actual notice." *EPA*, 485 F.2d at 784 f.n. 2.

One commentator specifically observed that the All Writs Act can be invoked to assist district courts in enforcing salvage orders pertaining to historic wrecks. John P. Fry, *The Treasure Below: Jurisdiction Over Salvage Operations in International Waters*, 88 Colum. L. Rev. 863, 875 (1988). The commentator states that "[i]n cases where the proceeding was *in rem*, the Supreme Court has consistently held that nonparties who interfere with a court's control of the res, or who acquire an interest in property that is the subject of an injunction will be bound by the injunction provided they have actual notice of it." The commentator concluded: "[t]hus, an injunction may be justified even though it has extraterritorial effects, which in the interest of international judicial comity would otherwise counsel restraint." *Id.* at 875.

The court of appeals failed to mention or address the application of the All Writs Act. The language of the Act, as well as the cases applying the Act to similar situations, reveal that this is precisely the kind of situation where its application is appropriate. When viewed in conjunction with this Court's decision in *Washington*, 443 U.S. at 693 f.n. 32, 99 L.Ed. at 3078 f.n. 32, it seems clear that the court of appeals erred when it completely ignored the authority of the All Writs Act and refused to recognize the *in rem* injunction issued by the district court.

II. THIS COURT SHOULD ALLOW DISTRICT COURTS TO RECOGNIZE THAT EXCLUSIVE SALVAGE RIGHTS BAR ENCROACHMENTS ON THE WRECK WHEN SUCH ENCROACHMENTS WOULD BE NECESSARY TO VIEW OR PHOTOGRAPH THE WRECK.

The Constitution of the United States extends the "judicial power of the United States" to "all cases of admiralty and maritime jurisdiction." U.S. Const. Art. III, §2. Congress implemented this constitutional grant of power in section 9 of the Judiciary Act of 1789 by providing that "... the district courts ... shall also have exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction ... saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it; ...." 1 Stat. 76-77; *see* 28 U.S.C.A. § 1333(current version). While the Constitution extends the judicial power to admiralty cases, it is silent as to the substantive law to be applied in such cases. It has fallen to the federal courts to set forth the law. Therefore, where circumstances change, the federal courts are particularly suited to adapt admiralty law to fit those circumstances. *See Romero v. International Terminal Operating Co.*, 358 U.S. 354, 360-61, 79 S.Ct. 468, 474, 3 L.Ed.2d 368 (1959) (noting that the Constitution "empowered federal courts in their exercise of the admiralty and maritime jurisdiction which had been conferred on them, to draw on the substantive law 'inherent in the admiralty and maritime jurisdiction' (citation omitted) and to continue development of this law within constitutional limits.") That is precisely what has happened in the field of salvage of historic wrecks. Many wrecks, long lying undiscovered and undisturbed in the deep ocean, usually in international waters, may now be located and reached by salvors due to advances in technology. Furthermore, the safety risks involved in salvaging wrecks lying in the deep ocean require special protection for the salvors of such wrecks.

The district court sought to adapt the law of salvage to protect historic wrecks lying in international waters. The district court found that RMST had embarked upon a responsible course of action by entering into a contract to maintain the artifacts as a single collection rather than selling them individually. RMST pledged to the district court that it would keep the collection of artifacts together, and would exhibit rather than sell the artifacts. App. 70. Because RMST has declined to sell individual artifacts in order to finance its continuing restoration, preservation and salvage efforts, the district court found it appropriate to enhance the salvor's economic incentive to continue to salvage the wreck by excluding others from visiting and photographing the wreck. App. 71. This is a reasonable extension of existing law because the total darkness at the wreck site would require encroachments in order to illuminate and view the wreck.

The district court also recognized that the forbidding conditions at the wreck site, including total darkness and unimaginable pressure, coupled with limitations on the technology available to reach and view the site, made casual access by sightseers and photographers, uninformed by the ongoing plan of salvage, dangerous and unwise. App. 68-69, 84. The district court prohibited this access at the request of RMST because it put the wreck and the wreck site at risk, not only threatening the ability of the salvor to safely and efficiently exploit the wreck to the fullest extent (in keeping with its rights and obligations as salvor-in-possession to maintain a reasonable presence at the site), but also placing the wreck itself at risk of damage from those who would visit it on a casual basis.

The court of appeals stated that it was not satisfied that the law of salvage would be properly extended to give salvors exclusive image recording rights in yet to be saved property. App. 41. However, such an extension is particularly appropriate in a case such as this, where the district court finds that the salvor's ongoing activities have

been successfully conducted in an historically and archaeologically responsible manner. Under these circumstances, enhancing the salvor's award will result in a greater likelihood that the salvor will continue his efforts.

The Fourth Circuit added to the criteria for determining the amount of a reasonable salvage award to include the degree to which a salvor protects the archaeological and historical significance of the wreck. *Columbus-America Discovery Group v. The Wrecked, Unidentified, etc.*, 974 F.2d 450 (4th Cir. 1992), cert. denied, 507 U.S. 1000, 113 S.Ct. 1625, 123 L.Ed.2d 183 (1993). Where the salvor is not selling artifacts, there is no other way to enhance the salvage award, to recognize the salvor's protection of the archaeological and historical significance of the wreck, other than by preventing third parties from viewing and obtaining valuable images of the wreck.

With the current ability of salvors to reach historic wrecks lying in the deep ocean, the district court charted the course for the future of the salvage of historic wrecks using and extending traditional notions of salvage law to protect and to reward a responsible salvor as well as to ensure the completion of the salvage project. This Court should therefore reinstate the district court's far-sighted opinion.

CONCLUSION

In addressing an important issue of maritime law, the Fourth Circuit has disregarded the law of this Court and the All Writs Act by holding that *in rem* injunctions are not appropriate in salvage cases, thereby eviscerating a central tenet of a salvage action – protection of the salvor's right to salvage – and ignoring this Court's precedent regarding *in rem* injunctions. The Fourth Circuit also erred by refusing to protect a salvor's right to fully and safely exploit an historic wreck and to compensate for responsible historical salvage.

For all these reasons, this Court should grant the Petition for Writ of Certiorari and reverse, as to the issues

raised above, the decision of the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted this 22nd day of June, 1999.

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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 98-1934
(CA-93-902-N)

R.M.S. Titanic, Inc., etc.,
Plaintiff - Appellee,

versus

Christopher S. Haver, et al,
Parties in Interest - Appellants.

Filed: April 28, 1999
Entered: April 28, 1999

ORDER

The court amends its opinion filed March 24, 1999, as follows:

On page 27, first full paragraph, line 9 -- the citation to "California, 332 at 34" is corrected to read "Louisiana, 363 U.S. at 34 . . . ."

On page 34, first full paragraph, lines 11-12 -- the citation is corrected to end "The Akaba, 54 F. at 200."

For the Court - By Direction

/s/ Patricia S. Connor
Clerk

PUBLISHED
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

R.M.S. TITANIC, INCORPORATED,
successor in interest to Titanic
Ventures, limited partnership,
Plaintiff-Appellee,

v.

CHRISTOPHER S. HAVER; DEEP OCEAN
EXPEDITIONS,
Parties in Interest-Appellants,

and

THE WRECKED AND ABANDONED VESSEL,
its engines, tackle, apparel,
appurtenances, cargo, etc., located
within one (1) nautical mile of a point
located at 41° 43' 32" North Latitude
and 49° 56' 49" West Longitude,
believed to be the R.M.S. Titanic, in
rem,
Defendant,

LIVERPOOL AND LONDON STEAMSHIP
PROTECTION AND INDEMNITY ASSOCIATION
LIMITED,
Claimant,

WILDWINGS WORLDWIDE TRAVEL;
BAKERS WORLD TRAVEL; QUARK
EXPEDITIONS, INCORPORATED; MIKE
MCDOWELL; RALPH WHITE; DON WALSH,
Ph.D.; ALFRED S. MCLAREN, Ph.D.;

R/V AKADEMIK MSTISLAV KELDYSH;
BLACKHAWK TELEVISION,
Parties in Interest,

and

JOHN A. JOSLYN,
Movant.

THE EXPLORERS CLUB; THE ADVISORY
COUNCIL ON UNDERWATER ARCHAEOLOGY;
COLUMBUS-AMERICA DISCOVERY GROUP,
Amici Curiae.

No. 98-1934

Appeal from the United States District Court for the Eastern District of Virginia, at Norfolk. J. Calvitt Clarke, Jr., Senior District Judge. (CA-93-902-N)

Argued: October 29, 1998
Decided: March 24, 1999
Entered: March 24, 1999

Before ERVIN, WILKINS, and NIEMEYER, Circuit Judges.

Affirmed in part, reversed in part, and remanded by published opinion. Judge Niemeyer wrote the opinion, in which Judge Ervin and Judge Wilkins joined.

COUNSEL

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OPINION

NIEMEYER, Circuit Judge:

This appeal presents questions about the authority of a United States court to regulate the salvage rights in the wreck of the luxury liner, R.M.S. Titanic, which lies in international waters.

The Titanic was launched in 1912 as the "largest and finest steamship ever built" and with the claim that she was "unsinkable." On her maiden voyage from Southampton to New York, however, with 2,340 passengers on board, the Titanic collided with an iceberg in the North Atlantic and sank less than three hours later, on April 15, 1912. A nearby ship saved 745 persons and some lifeboats and took them to New York. Another ship recovered several hundred bodies and took them to Halifax, Nova Scotia.

In 1985, the wreck of the Titanic was discovered at the bottom of the North Atlantic in international waters, approximately 400 miles off the coast of Newfoundland in 12,500 feet of water. Salvage efforts began two years later. In 1994, the district court in the Eastern District of Virginia, exercising "constructive in rem jurisdiction" over the wreck and the wreck site of the Titanic, awarded exclusive salvage rights, as well as ownership of recovered artifacts, to R.M.S. Titanic, Inc., ("RMST"), a Florida corporation. Two years

later, the court rejected a challenge to the exclusive salvage rights of RMST, see R.M.S. Titanic, Inc. v. The Wrecked and Abandoned Vessel, ("Titanic I"), 924 F. Supp. 714 (E.D. Va. 1996), and shortly thereafter, entered an injunction dated August 13, 1996, protecting the salvage rights of RMST against any person in the world "having notice of this Order," prohibiting any such person from "conducting search, survey, or salvage operations, or obtaining any image, photographing or recovering any objects, entering, or causing to enter" the area of the Atlantic Ocean surrounding the Titanic wreck site. On June 23, 1998, the court reaffirmed, "personalized and enforced" the 1996 injunction against new parties. R.M.S. Titanic, Inc. v. The Wrecked and Abandoned Vessel, ("Titanic II"), 9 F. Supp.2d 624, 626 (E.D. Va. 1998). In that order, the court enjoined the appellants, Christopher S. Haver, an Arizona resident, and Deep Ocean Expeditions, ("DOE"), a British Virgin Islands corporation, as well as others from:

> (i) interfering with the rights of [RMST], as salvor in possession of the wreck and wreck site of the R.M.S. Titanic, to exclusively exploit the wreck and wreck site, (ii) conducting search, survey, or salvage operations of the wreck or wreck site, (iii) obtaining any image, video, or photograph of the wreck or wreck site, and (iv) entering or causing anyone or anything to enter the wreck or wreck site with the intention of performing any of the foregoing enjoined acts.

Id. at 640. The district court declared that the wreck site subject to the injunction was a 168-square-mile rectangular zone in the North Atlantic bounded by the following points:

> 41° 46' 25" North Latitude, 050° 00' 44" West Longitude, then east to 41° 46' 25" North Latitude, 049° 42' West Longitude, then south to 41° 34' 25" North Latitude, 049° 42' West Longitude, then west to 41° 34' 25" North Latitude, 050° 00' 44" West Longitude, then returning north to the start.

Id. DOE had planned an expedition to view and to photograph the Titanic for the late summer of 1998, and Haver had planned to be a passenger.

DOE, never a party to the proceedings in the district court, and Haver, who filed a declaratory judgment action in the district court to challenge the court's jurisdiction over the wreck and over him, appealed to this court to challenge the June 1998 injunction. They claim (1) that the district court lacked jurisdiction over the wreck and wreck site, (2) that the court lacked personal jurisdiction over them, and (3) that the scope of the injunction is too broad. As they summarize their position,

> No theory of "constructive in rem jurisdiction" permits a court to adjudicate the rights of persons over which it lacks personal jurisdiction with respect to a vessel [in international waters] that has never been within the court's territory. Nor does any such theory authorize an injunction prohibiting persons from viewing and photographing a wreck when the salvor is not actively conducting salvage operations.

For the reasons that follow, we affirm in part and reverse in part the injunctions and remand the case to the district court with instructions to modify them in accordance with this opinion.

I

A procedural history, while somewhat involved, is nonetheless necessary for an understanding of the jurisdictional discussions that follow.

In 1985, a joint American-French expedition discovered the wreck of the Titanic. Two years later, in the summer of 1987, Titanic Ventures, a Connecticut limited partnership, in conjunction with the Institute of France for the Research and Exploration of the Sea, the French government's oceanographic institution, voluntarily undertook efforts to salvage the wreck. Titanic Ventures conducted 32 dives over 60 days, recovering approximately 1,800 artifacts. It thereafter sold both its interest in the salvage operation and the artifacts it recovered to RMST. RMST recovered another 800 artifacts during a second expedition to the Titanic's wreck site in 1993.

In August 1993, RMST filed this action in the Eastern District of Virginia, requesting, among other things, that the district court exercise in rem jurisdiction over the Titanic to award it exclusive salvage rights. In support of its request, RMST presented the court with a wine decanter salvaged from the Titanic and stated that numerous other artifacts were physically within the Eastern District of Virginia. The court issued a warrant directing the United States Marshal to arrest the wreck and all artifacts already salvaged and yet to be salvaged from the wreck and, at the same time, ordered that RMST be substituted for the Marshal as custodian of the wreck, the wreck site, and the artifacts. Formal notice of the court's order appeared in three newspapers, The Virginian-Pilot, The Wall Street Journal, and The Journal of Commerce.

Only one party, Liverpool and London Steamship Protection and Indemnity Association ("Liverpool & London"), filed a claim asserting an interest in the wreck. After RMST and Liverpool & London entered into a settlement agreement, the district court dismissed Liverpool

& London's claim on June 7, 1994. On the same day, the court entered a separate order granting RMST not only exclusive salvage rights over the wreck and the wreck site of the Titanic, but also "true, sole and exclusive owner[ship] of any items salvaged from the wreck."

In 1996, a competing salvor, John A. Joslyn, filed a motion in the action under Federal Rule of Civil Procedure 60(b), challenging RMST's status as exclusive salvor of the Titanic and requesting that the court rescind its June 1994 order. Joslyn claimed not only that RMST had failed diligently to salvage the Titanic, but also that RMST lacked the financial capacity to undertake future salvage operations. Following a hearing, the district court denied Joslyn's motion, finding that RMST had successfully undertaken a number of salvage operations and that its favorable prospects for ongoing and future salvage demonstrated that RMST deserved to remain the exclusive salvor-in-possession. See Titanic I, 924 F. Supp. at 722-24.

When Joslyn, nonetheless, expressed an intention to visit the wreck site for the sole purpose of taking photographs, the district court issued a temporary restraining order to prevent him from doing so. The court reasoned that "the need for R.M.S. Titanic, Inc. to have jurisdiction over the wreck site" brought with it a power to determine "who could enter the site for any purpose and who could photograph the ship and the locale." The district court converted the temporary restraining order to a preliminary injunction, dated August 13, 1996, enjoining Joslyn as well as "[a]ny other person having notice of this Order, actual or otherwise," from:

> conducting search, survey, or salvage operations, or obtaining any image, photographing or recovering any objects, entering, or causing to enter, anything on or below the surface of the Atlantic Ocean, otherwise interfering with operations

conducted by plaintiff, or entering the wreck site for any purpose not approved by R.M.S. Titanic, Inc., within a ten (10) mile radius of the following coordinates:

Longitude: 41 degrees 43 minutes North
Latitude: 49 degrees 56 minutes West

until further order of Court.

In entering the injunction, the court reasoned that "allowing another `salvor' to take photographs of the wreck and wreck site is akin to allowing another salvor to physically invade the wreck and take artifacts themselves."

In the spring of 1998, Deep Ocean Expeditions ("DOE"), a British Virgin Islands corporation headquartered on the Isle of Man, Great Britain, began marketing an expedition dubbed "Operation Titanic," planned for August 1998, that would allow members of the public to visit the wreck of the Titanic. The expedition was to be conducted with the assistance of the P.P. Shirshov Institute of Oceanology of the Russian Academy of Sciences in Moscow, using its research ship, the R/V Akademik Keldysh, and one of its two deep-sea submersibles, Mir 1 or Mir 2. The Russian submersibles had conducted numerous earlier dives to the Titanic. DOE announced the cost of participating at $32,500 per person. One of the subscribers was Christopher S. Haver, an Arizona resident.

When RMST learned that DOE's "Operation Titanic" would result in persons' viewing and photographing the Titanic wreck, RMST filed another motion for a preliminary injunction in this action to prevent DOE, among others, from visiting and photographing the wreck site. At the same time, Haver filed a separate action against RMST seeking a declaratory judgment that he had a right to enter the wreck site to observe, video, and photograph the Titanic. RMST filed a counterclaim in Haver's action, requesting a

preliminary injunction to prohibit him from visiting the site. The district court consolidated Haver's action with the ongoing in rem action and conducted a hearing in the consolidated action on May 27, 1998. While Haver thus appeared by filing his own action to challenge the district court's jurisdiction over the wreck and the wreck site of the Titanic, as well as the court's personal jurisdiction over him, DOE did not appear, having not been served with any process.

Following the hearing, the district court disposed of all the issues before it in an order dated June 23, 1998. On the challenge to its exercise of in rem jurisdiction over the Titanic, the district court observed that while "[i]t is undisputed that the wreck lies in international waters . . . and no state may exercise sovereignty over any part of the high seas, . . . these rules must be harmonized with the internationally recognized rules of salvage." Titanic II, 9 F. Supp.2d at 634. Observing that "internationally recognized principles governing salvage on the high seas encourage the exercise of in rem jurisdiction over a wreck site to facilitate the salvage operation itself," the court affirmed its exercise of "constructive in rem jurisdiction over the R.M.S. Titanic wreck site to facilitate RMST's salvage operations .. . under international law." Id. In reaching this conclusion, the court explained:

> It is in the interest of the whole world to have salvage claims decided in a single forum so that multiple, conflicting litigation is avoided. The whole world is placed on notice of the action in this Court by the publication of notice of the in rem arrest. Moreover, the recognized international rights at stake are minimally infringed upon. Restricting freedom of navigation over a few square miles of the vast North Atlantic Ocean is hardly a significant intrusion.

Id. at 634-35.

The district court also rejected Haver's claims that the court did not have personal jurisdiction over him and that a new complaint for a preliminary injunction needed to be filed and served on him. The court noted that Haver consented to the court's jurisdiction by filing a declaratory judgment action raising the same issues affirmatively asserted by RMST. See id. at 635.

The district court then addressed the merits of the question of whether RMST, as salvor-in-possession, had the right to exclude others from visiting the wreck site to photograph the wreck. In justifying the entry of the injunction, the court relied upon general safety concerns caused by the depth and darkness of the North Atlantic waters around the wreck site, the need to protect RMST's substantial investment to date in salvaging the Titanic, and the public's interest in preventing unorganized, piecemeal salvaging of the Titanic, a shipwreck of great historical significance. See id. at 635-36. The court also observed that those enjoined by its order from personally viewing the Titanic could enjoy future television broadcasts of RMST's salvage efforts. See id. at 638. Accordingly, the court enjoined not only DOE and Haver, but also "anyone else having notice" from obtaining any image, video or photograph of the wreck or the wreck site and from "entering or causing anyone or anything to enter the wreck or the wreck site with the intention of performing any of the foregoing enjoined acts." Id. at 640. The court defined the wreck site as encompassing a 168 square mile area of the North Atlantic surrounding the wreck of the Titanic. See id. The injunction, by its terms, was to remain in effect "[u]ntil further order of this Court." Id.

From the district court's June 23, 1998 order, Haver filed this appeal. While DOE was not made a party to the litigation below, it too appealed because the injunction

entered by the district court was specifically directed against it.

II

We resolve first the threshold question of whether DOE, who was not a party to the proceeding in the district court, may appeal the June 23, 1998 order enjoining it from visiting and photographing the Titanic. RMST contends that because DOE was a "non-party" in the action below, its appeal should be dismissed because "[n]on-parties have no right to appeal."

In the district court, RMST requested a preliminary injunction against DOE, arguing that DOE was subject to the jurisdiction of the court. It maintained that DOE had personal notice of the motion because RMST had made telephone calls to DOE's principal at his home in Germany informing him of the motion and because RMST served a copy of the motion on DOE's counsel in Washington, D.C. Despite this notice, DOE elected not to appear at the hearing. Because of DOE's failure to appear in the district court, RMST argues that DOE now has no right to appeal.

Consistent with its position that the district court lacked personal jurisdiction over it, DOE maintains that it did not appear because it was never served with process and, in any event, would not be subject to service of process. It notes, however, that because the court nevertheless granted RMST's motion and issued the June 23, 1998 preliminary injunction specifically "against Christopher Haver, Deep Ocean Operators [DOE]," and other related companies and persons, including DOE's principal, it is entitled to challenge the ruling.

This sequence of events reveals an inconsistency in RMST's position. RMST maintained that the district court had the power to enjoin DOE, and yet, after it successfully persuaded the court to do just that, it takes the position that DOE may not challenge entry of the injunction because DOE

elected not to appear before the district court. We believe that this position is untenable.

Due process dictates and principles of fairness counsel that DOE be given an opportunity to challenge the district court's assertion of jurisdiction over it, particularly when the court specifically entered an injunction against DOE. See Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 110-12 (1969). In Hazeltine, the Supreme Court permitted Hazeltine, the non-party parent company of the named counter-defendant, to challenge a money judgment and an injunction entered against it by the district court even though it was not a party to the district court's proceedings. The Supreme Court had little difficulty concluding that although Hazeltine's subsidiary had entered a pretrial stipulation in the district court that Hazeltine and its subsidiary were to be considered as one entity for purposes of the litigation, "this fact cannot [now] foreclose Hazeltine, which has never had its day in court" from being heard on that issue. Id. at 111. Likewise, we conclude that DOE should not be foreclosed from being heard on its jurisdictional challenge and that therefore it properly invoked 28 U.S.C. § 1292(a) to appeal the district court's jurisdiction to enter a preliminary injunction against it.

III

Also as a threshold question, we must determine whether a live case or controversy within the meaning of Article III of the Constitution remains, given the parties' representation to us at oral argument that Operation Titanic, the expedition prompting the district court's June 1998 order, took place in the fall of 1998. Accordingly, we must determine whether any decision by us today will make a difference to the parties by affording meaningful relief. See Church of Scientology of California v. United States, 506 U.S. 9, 12 (1992) ("It has long been settled that a federal court has no authority `to give opinions upon moot questions

or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue before it'" (quoting Mills v. Green, 159 U.S. 651, 653 (1895))).

The conflict between DOE's intention to continue its business as advertised and the scope of the district court's injunction protecting RMST indicates that a live controversy between the parties remains. Both in its brief and at oral argument, DOE expressed its intention to continue to undertake expeditions to the Titanic in the near future, and we have no reason to doubt its capacity to do so. Because the district court's injunction continues to preclude DOE from making any trips "[u]ntil further order from this Court," Titanic II, 9 F. Supp.2d at 640, a live controversy exists.

IV

Beyond these threshold questions of justiciability, both DOE and Haver challenge the district court's personal jurisdiction over them.

The district court justified its jurisdiction to enter an injunction against DOE because it had, what it called, "constructive in rem jurisdiction over the wreck itself based on the presence within the judicial district of physical items salvaged from the wreck." Titanic II, 9 F. Supp.2d at 632. Believing that United States district courts have jurisdiction to adjudicate salvage claims for wrecks in international waters, the district court concluded that the proper administration of a salvage claim required it to take in rem jurisdiction over the Titanic wreck in international waters and, with that jurisdiction, to "protect the salvor in possession when it is impossible to bring the entire wreck into the judicial district at a single point in time." Id. at 633. "Since the salvor is still performing salvage operations," the court reasoned, "the in rem case is still pending, and an injunction may properly issue pursuant to the Federal Rules of Civil Procedure." Id. at 635. The court thus concluded that its "constructive in rem jurisdiction" authorized it to enjoin

DOE and others against interfering with the salvor's ongoing operations and that this authority extended against the "whole world." Id. at 634. The court explained:

> If notice is provided in a newspaper of general circulation, the whole world, it is said, are parties in an admiralty cause; and, therefore, the whole world is bound by the decision.

Id. (omitting internal quotation marks and citations). The court added that accordingly, "[a]ny current claim of ignorance to the in rem salvage action is necessarily foreclosed." Id.

In addition to the grounds advanced by the district court, RMST argues on appeal that not only does the district court have "the ability to enter orders against the whole world . . . based on its quasi in rem jurisdiction[1] over the wreck and wreck site," it also has the authority to exercise jurisdiction over "anyone who aids and abets Haver . . . in violating its orders." RMST contends that by agreeing to take Haver to the site, DOE was aiding Haver in violating the district court's injunction. Therefore, in RMST's view,

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[1] RMST's invocation of "quasi in rem" jurisdiction appears to be misplaced. Quasi in rem jurisdiction is invoked as an interim step to obtain in personam jurisdiction. See Shaffer v. Heitner, 433 U.S. 186, 196 (1977). To be sure, in Shaffer, the Court stated that in a quasi in rem action, the "only role played by the property is to provide a basis for bringing the defendant into court." Id. at 209. Articulating the role of quasi in rem jurisdiction, the Federal Rules of Civil Procedure state that when a complaint names a defendant who cannot be found within the district, property of the defendant within the district may be seized either to compel the defendant's appearance or to give effect to the relief requested in the complaint. See Fed. R. Civ. P. Supp. R. E(4). This case has little to do with quasi in rem jurisdiction because the wreck of the Titanic lies outside the district court's territorial jurisdiction. The proper inquiry here is whether a court in admiralty can award salvage rights in a shipwreck outside of United States' territorial waters.

because the district court had jurisdiction over Haver, it also had jurisdiction over DOE.

DOE maintains that the district court cannot enter an injunction against it without having personal jurisdiction over it and that in this case the court never obtained personal jurisdiction over it because: (1) a complaint against it was never filed as required by Federal Rule of Civil Procedure 3; (2) it was never served with a complaint and a summons or other process; and (3) such service, if made, would be ineffective because there is no authority for "worldwide service of process in admiralty cases . . . even if there were a constitutionally sufficient relationship between [DOE] and the forum."

Haver also challenges the district court's personal jurisdiction over him, arguing that he was never made a party to the in rem action initiated by RMST and that his separate declaratory judgment action was improperly consolidated with the in rem action to make him a party.

A

To resolve this jurisdictional dispute, we must first emphasize the distinction between in personam jurisdiction and in rem jurisdiction. While actions based on both types of jurisdiction are grounded on the principle that "every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory," Pennoyer v. Neff, 95 U.S. 714, 722 (1877), "[a]ctions in rem are prosecuted to enforce a right to things," whereas "actions in personam are those in which an individual is charged personally." The Sabine, 101 U.S. 384, 388 (1879) (emphasis added). Because in rem actions adjudicate rights in specific property before the court, judgments in them operate against anyone in the world claiming against that property. See The Moses Taylor, 71 U.S. (4 Wall.) 411, 427 (1866) (describing in rem jurisdiction and stating that "[i]t is this dominion of the suit in admiralty over the vessel or thing itself which gives to the

title made under its decrees validity against all the world"); see also Darlak v. Columbus-America Discovery Group, Inc., 59 F.3d 20 (4th Cir. 1995). Consequently, judgments in in rem actions affect only the property before the court and possess and carry no in personam significance, other than to foreclose any person from later seeking rights in the property subject to the in rem action. See Pennoyer, 95 U.S. at 724. The court's authority to exercise in rem jurisdiction does not carry with it a concomitant, derivative power to enter ancillary in personam orders. See The Sabine, 101 U.S. at 388.

In personam actions, on the other hand, adjudicate the rights and obligations of individual persons or entities. It is well established that due process precludes courts from adjudicating in personam the rights or obligations of persons in the absence of personal jurisdiction. See Omni Capital Int'l, Ltd. v. Rudolf Wolff & Co. Ltd., 484 U.S. 97, 104 (1987); Zenith Corp., 395 U.S. at 110; Koehler v. Dodwell, 152 F.3d 304, 306-07 (4th Cir. 1998). To obtain personal jurisdiction over a defendant, a court must have (1) proof of "notice to the defendant," (2) "a constitutionally sufficient relationship between the defendant and the forum," and (3) "authorization for service of a summons on the defendant." Omni Capital, 484 U.S. at 104; ESAB Group, Inc. v. Centricut, Inc., 126 F.3d 617, 622 (4th Cir. 1997).

Injunctive relief, by its very nature, can only be granted in an in personam action commenced by one party against another in accordance with established process. Consequently, a party cannot obtain injunctive relief against another without first obtaining in personam jurisdiction over that person or someone in legal privity with that person. See Fed. R. Civ. P. 65(d).

By contrast, injunctive relief ordered in an in rem action would be meaningless because things or property cannot be enjoined to do anything. Likewise, personal jurisdiction need not be exercised in a pure in rem proceeding because, in the simplest of terms, a piece of

property and not a person serves as the defendant. See The Moses Taylor, 71 U.S. at 431 ("The distinguishing and characteristic feature of . . . [an in rem] suit is that the vessel or thing proceeded against is itself seized and impleaded as the defendant, and is judged and sentenced accordingly"). In rem actions only require that a party seeking an interest in a res bring the res into the custody of the court and provide reasonable, public notice of its intention to enable others to appear in the action to claim an interest in the res. See Roller v. Holly, 176 U.S. 398, 403-06 (1900); see also Fed. R. Civ. P. Supp. R. C(4) (requiring public notice as part of an in rem admiralty proceeding).

Thus, when DOE and Haver argue that the district court lacked personal jurisdiction over them, they do not, of necessity, challenge RMST's status as exclusive salvor, and their personal jurisdiction challenge has no implication for the validity of the in rem proceedings or the order entered in 1994 awarding RMST its status as exclusive salvor of the wreck Titanic. DOE's challenge aims solely at the district court's authority to enter an in personam order against it absent personal jurisdiction over it.

B

Turning now to consider these requirements in the present context, it becomes readily apparent that the district court did not obtain in personam jurisdiction over DOE. While the district court had subject matter jurisdiction over this admiralty action, see 28 U.S.C. § 1333, this did not give it authority to issue process for extraterritorial service on DOE. Moreover, it is undisputed that RMST did not actually file a complaint against DOE, nor did it purport to serve DOE with any process. RMST's process consisted merely of filing a motion for preliminary injunction against DOE in the pending in rem action, to which DOE had never been made a party, and giving DOE informal notice of the motion's pendency.

DOE is a British Virgin Islands corporation with its principal place of business on the Isle of Man in Great Britain. Its principal resides in Germany where he concededly received notice by telephone of RMST's motion for preliminary injunction. DOE's counsel in Washington, D.C. also received a copy of the motion. In addition, constructive notice of the underlying in rem proceeding had been provided in 1993 through publication in The Virginian-Pilot, The Wall Street Journal, and The Journal of Commerce. Thus, there can be no dispute that DOE had actual notice of RMST's motion for an injunction. But this does not alone meet the formal requirements for obtaining personal jurisdiction over DOE.

Because DOE did not appear in the district court either in 1994 to claim an interest in the wreck of the Titanic or in 1998 to challenge RMST's motion for a preliminary injunction, it did not voluntarily subject itself to the court's jurisdiction. Further, there is no evidence in the record at this point to suggest that DOE conducts any business in the United States. Its operations are conducted in Great Britain, and the expeditions it would be conducting to the Titanic would take place in international waters. It does, however, market its expedition in the United States through United States corporations. Indeed, it appears that through those marketing efforts, Haver learned of the expedition and subscribed to participate in it.

Whether DOE's contacts with the United States would justify service of process pursuant to Federal Rule of Civil Procedure 4(k) to obtain personal jurisdiction cannot be determined on this record. But it is clear that process against DOE never issued, nor was service of process ever attempted. As we have noted, while a district court having jurisdiction over a res is entitled to adjudicate salvage rights with respect to the res, when enforcing orders to give effect to those rights against a third party who, through conduct, challenges them, the court must obtain in personam jurisdiction over the third party through the service of

process. Because such process was neither issued nor served on DOE in this case, the injunction against DOE must be vacated for lack of personal jurisdiction.

We also note that DOE's agreement to take Haver on an expedition to the Titanic does not place DOE in privity with Haver to entitle RMST to rely on jurisdiction over Haver to reach DOE. See Fed. R. Civ. P. 65(d). There is no evidence from which to infer that DOE conspired with or encouraged Haver to violate the district court's injunction, nor is there evidence that Haver actually violated its injunction.

C

As for Haver, we find his challenges to the district court's personal jurisdiction over him without merit. It is true that process did not issue from the in rem action to make Haver a party to that action. But that would not be otherwise, because the in rem action only addressed rights to the res of the Titanic wreck. And in challenging the district court's personal jurisdiction over him, Haver has asserted no right to the res.

Significantly, however, Haver commenced his own in personam action against RMST, seeking a declaratory judgment that, notwithstanding the August 1996 injunction entered in the in rem action, he was entitled "to enter the site of, and to observe, photograph, and videotape, the wrecked vessel R.M.S. Titanic." RMST filed a counterclaim against Haver in the declaratory judgment action seeking an injunction against him in that action just as it was seeking in the in rem action. Thus, Haver was a party to an action in which injunctive relief against him was sought.

The district court consolidated Haver's declaratory judgment action with the pending in rem action by order dated May 12, 1998. In its consolidation order, the district court stated that the in personam action "will no longer exist as a separate case." This consolidation was well within the

district court's discretion. See Fed. R. Civ. P. 42(a) (authorizing consolidation of "actions involving a common question of law or fact"); see also Fed. R. Civ. P. 9(h) (authorizing unified actions but preserving, within actions, the nature of maritime claims).

By filing an in personam action in the district court seeking a declaratory judgment, Haver consented to the district court's personal jurisdiction over him, and RMST's counterclaim was part of that action. See Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 703 (1982) (stating that an individual submits to a court's jurisdiction by appearance). When the district court granted RMST's motions for injunctive relief, which were filed both in the in rem action and in Haver's action and later consolidated, Haver was a party. By consolidating the cases, the court surely did not relinquish its jurisdiction over Haver.

In short, Haver was properly before the district court as a party, and the district court had in personam jurisdiction to enter a preliminary injunction against him.

V

Because the district court had personal jurisdiction over Haver, we must address his claim that the district court could not have exercised jurisdiction over the wreck and the wreck site of the Titanic because the wreck lay in international waters. Haver maintains that while the presentation of a wine decanter and other artifacts from the wreck to the district court in the Eastern District of Virginia might have enabled the district court to exercise in rem jurisdiction over those artifacts, there exists no principle that authorized the district court to exercise in rem jurisdiction over the wreck itself which is beyond the territorial waters of the United States. Without in rem jurisdiction, Haver argues, the district court had no power to adjudicate salvage rights and therefore had no power to enter an injunction giving effect to salvage rights.

Any analysis regarding the authority of a United States court to adjudicate salvage rights in shipwrecks in international waters requires inquiry first into several fundamental principles of admiralty: (1) the nature and scope of admiralty jurisdiction, (2) the applicability of salvage law as part of the common law of maritime nations, i.e., the jus gentium, and (3) the reach of an admiralty court's in rem jurisdiction. Only after we have explicated these principles can we address the existence and scope of authority of a United States court over the Titanic.

A

Article III of the Constitution extends the judicial power of federal courts to "all Cases of admiralty and maritime Jurisdiction." U.S. Const. art. III, § 2, cl. 1. And Congress implemented Article III by conferring on district courts exclusive, original jurisdiction of "[a]ny civil case of admiralty or maritime jurisdiction" and "[a]ny prize brought into the United States and all proceedings for the condemnation of property taken as prize." 28 U.S.C. § 1333. Maritime law was placed under national control "because of its intimate relation to navigation and to interstate and foreign commerce." Panama R.R. Co. v. Johnson, 264 U.S. 375, 386 (1924).

The body of admiralty law referred to in Article III did not depend on any express or implied legislative action. Its existence, rather, preceded the adoption of the Constitution. It was the well-known and well-developed "venerable law of the sea" which arose from the custom among "seafaring men," see United States v. W. M. Webb, Inc., 397 U.S. 179, 191 (1970), and which enjoyed "international comity," see The Belgenland, 114 U.S. 355, 363 (1885). Nations have applied this body of maritime law for 3,000 years or more. Although it would add little to recount the full history here, we note that codifications of the maritime law have been preserved from ancient Rhodes (900

B.C.E.), Rome (Justinian's Corpus Juris Civilis) (533 C.E.), City of Trani (Italy) (1063), England (the Law of Oleron) (1189), the Hanse Towns or Hanseatic League (1597), and France (1681), all a rticulating similar principles. And they all constitute a part of the continuing maritime tradition of the law of nations -- the jus gentium.

The framers drafted Article III with this full body of maritime law clearly in view. This is not to say that the Constitution recognized an overarching maritime law that was to bind United States courts. On the contrary, the Constitution conferred admiralty subject matter jurisdiction on federal courts and, by implication, authorized the federal courts to draw upon and to continue the development of the substantive, common law of admiralty when exercising admiralty jurisdiction. See The Lottawanna, 88 U.S. 558, 572-78 (1874); see also 1 Benedict on Admiralty § 105, at 7-11 (7th ed. 1998). As Chief Justice Marshall observed:

> A case in admiralty does not, in fact, arise under the Constitution or laws of the United States. These cases are as old as navigation itself; and the law, admiralty and maritime, as it has existed for ages, is applied by our Courts to the cases as they arise.

The American Ins. Co. v. 356 Bales of Cotton, 26 U.S. (1 et.) 511, 544-45 (1828).

Since the Founding, federal courts sitting in admiralty jurisdiction have steadfastly continued to acquiesce in this jus gentium governing maritime affairs. Indeed, the Supreme Court has time and again admonished that "courts of this and other commercial nations have generally deferred to a non-national or international maritime law of impressive maturity and universality." Lauritzen v. Larsen, 345 U.S. 571, 581 (1953); see also United States v. W.M. Webb, Inc., 397 U.S. at 191 (1970) (observing that the

"[m]aritime law . . . provides an established network of rules and distinctions that are practically suited to the necessities of the sea"). This body of maritime law "has the force of law, not from extraterritorial reach of national laws, nor from abdication of its sovereign powers by any nation, but from acceptance by common consent of civilized communities of rules designed to foster amicable and workable commercial relations." Larsen, 345 U.S. at 581-82. Thus, when we say today that a case in admiralty is governed by the general maritime law, we speak through our own national sovereignty and thereby recognize and acquiesce in the time-honored principles of the common law of the seas. See Ex Parte Western Maid, 257 U.S. 419, 432 (1922).

The exercise of admiralty subject matter jurisdiction has never been limited to maritime causes arising solely in the United States territorial waters. On the contrary, maritime causes arising from matters on the high seas anywhere in the world have traditionally been brought to courts of admiralty, subject only to a discretionary exercise of the doctrine of forum non conveniens. See Offshore Logistics, Inc. v. Tallentire, 477 U.S. 207, 218-19 (1986); see also Mason v. Ship Blaireau, 6 U.S. (2 Cranch) 240 (1804); The Belgenland, 114 U.S. at 362-63 (in rem admiralty jurisdiction proper in action arising out of collision on the high seas between two foreign vessels); Treasure Salvors, Inc. v. The Unidentified Wrecked & Abandoned Sailing Vessel, 640 F.2d 560, 567 (5th Cir. 1981) ("Since the admiralty jurisdiction of United States courts is not limited by the nationality of ships, sailors or seas involved and since the principles of the law of salvage are part of the jus gentium, i.e., the international maritime law, United States courts have long adjudicated salvage claims involving foreign vessels, alien salvors and salvage operations occurring on the high seas"); Grant Gilmore & Charles Black, Jr., The Law of Admiralty § 1-19, at 51-52 (2d ed. 1975) (stating that "[t]he courts of the United States take jurisdiction, subject to some reservations imposed by their

own application of the doctrine of forum non conveniens, of suits on maritime claims arising out of transactions and occurrences anywhere in the world" (footnotes omitted)).

Even though admiralty courts may adjudicate matters arising on navigable waters anywhere in the world, that recognition of subject matter jurisdiction does not imply that American courts in admiralty have the power to command that any person or any ship appear before a United States court sitting in admiralty. Stated differently, Article III of the Constitution and 28 U.S.C. § 1333 do not amount to an attempt by the United States to extend its sovereignty over persons (in personam) or things (in rem) beyond the territorial limits of the United States. While we note this important distinction between a broad subject matter jurisdiction and the limitation imposed by territorial jurisdiction, we discuss the territorial limitation in more detail. below.

B

The general maritime law of nations includes a law of finds and a law of salvage, and courts of admiralty apply one to the exclusion of the other, as appropriate, to resolve claims in property discovered and recovered in navigable waters by those other than the property's owners or those taking through them. See Columbus-America Discovery Group v. Atlantic Mut. Ins. Co., 974 F.2d 450, 459-60 (4th Cir. 1992). Under the law of finds, a person, who discovers a shipwreck in navigable waters that has been long lost and abandoned and who reduces the property to actual or constructive possession, becomes the property's owner. See Martha's Vineyard Scuba Headquarters, Inc. v. The Unidentified, Wrecked and Abandoned Steam Vessel, 833 F.2d 1059, 1065 (1st Cir. 1987); Hener v. United States, 525 F. Supp. 350, 354-57 (S.D.N.Y. 1981) (cited and quoted with approval in Columbus-America Discovery, 974 F.2d at 460).

Because the law of finds deprives the true owner of a property right, the courts of admiralty disfavor its application and prefer to apply the law of salvage in its stead. They have reasoned that the law of salvage better serves the needs of maritime commerce by encouraging the saving of property for the benefit of its owner rather than the secretive discovery of property in an effort to deprive the owner of title. See Columbus-America Discovery, 974 F.2d at 464; Hener, 525 F. Supp. at 354 ("salvage law assumes that the property being salved is owned by another, and thus that it has not been abandoned"). Accordingly, the law of finds is most often applied in the context of long-lost shipwrecks. See, e.g., Treasure Salvors, Inc. v. The Unidentified Wrecked & Abandoned Sailing Vessel, 569 F.2d 330, 337 (5th Cir. 1978) (applying the law of finds to the recovery of a Spanish vessel which sunk near the Florida Keys in 1622, stating that "disposition of a wrecked vessel whose very location has been lost for centuries as though its owner were still in existence stretches the fiction to absurd lengths"); see also 3A Benedict on Admiralty § 158, at 11-17 (7th ed. Supp. 1991) (recommending "limit[ing] the doctrine of 'find' relative to marine disasters to long-lost wrecks . .. or where the owners of maritime properties have publicly abandoned them" (footnote omitted)). Neither the parties nor the district court has urged the application of the law of finds in this case, leaving for application the law of salvage.

The principles of salvage law are intended to encourage persons to render prompt, voluntary, and effective service to ships at peril or in distress by assuring them compensation and reward for their salvage efforts. See The Akaba, 54 F. 197, 200 (4th Cir. 1893). Absent the promise of compensation and reward, we question whether a party, even one with the capacity to save the Titanic itself, would incur the costs to do so. See M/V JA Orgeron, 143 F.3d at 986 n.12 (observing that "if the costs of performing a salvage are too high or the benefits to be derived are too low, the parties might well agree to call it a day and let the sea claim its

prize"); see also William M. Landes & Richard A. Posner, Salvors, Finders, Good Samaritans, and Other Rescuers: An Economic Study of Law and Altruism, 7 J. Leg. Stud. 83, 100 (1978) (arguing that the law of salvage exists to "encourage rescues in settings of high transaction costs by simulating the conditions and outcomes of a competitive market").

The policies of salvage law have existed as an important part of the general maritime law of nations as long as there has been navigation. See M/V JA Orgeron, 143 F.3d at 985 ("This simple rule has been an integral part of maritime commerce in the western world since the western world was civilized"). Indeed, the 3,000-year old Rhodian Code provided:

> Article XLV. "If a ship be surprised at sea with whirlwinds, or be shipwrecked, any person saving anything of the wreck, shall have one-fifth of what he saves."

Reprinted in 3A Benedict on Admiralty § 5, at 1-8. And as to salvage from shipwrecks, the Rhodian Code provided:

> Article XLVII. "If gold, or silver, or any other thing be drawn up out of the sea eight cubits deep, he that draws it up shall have one-third, and if fifteen cubits, he shall have one-half, because of the depth."

Id. The Code also provided that those illegally pillaging a wreck would be required to restore fourfold. See id. The same principles of salvage were included in the Law of Oleron, codified about 2,000 years after the Rhodian Law and adopted in England in the 12th century. See id. § 8, at 1-11. And they continue to apply as part of the jus gentium today. See, e.g., International Convention on Salvage, April 29, 1989, preamble (providing that international salvage law

should "ensure that adequate incentives are available to persons who undertake salvage operations in respect of vessels and other property in danger"); see also United Nations Convention on the Law of the Sea, Dec. 10, 1982, 21 I.L.M. 1245, 1326 art. 303 (providing that the Convention respects "the rights of identifiable owners, the law of salvage or other rules of admiralty").[2]

When providing salvage service, a salvor acts on behalf of the owner in saving the owner's property even though the owner may have made no such request or had no knowledge of the need. The law of salvage presumes that the owner desires the salvage service. And it is the assurance of compensation and reward that provides the "inducement to seamen and others to embark in such undertakings to save life and property." The Blackwall, 77 U.S. 1, 14 (1870) (citation omitted). As the Court in Blackwall explained, "Public policy encourages the hardy and adventurous mariner to engage in these laborious and sometimes dangerous enterprises, and with a view to withdraw from him every temptation to embezzlement and dishonesty, the law allows him, in case he is successful, a liberal compensation." Id. (footnote omitted). If the salvor fails in his salvage efforts, however, he can claim no compensation or reward.

To establish a salvage claim for compensation and award, a person must demonstrate (1) that he has rendered aid to a distressed ship or its cargo in navigable waters; (2) that the service was voluntarily rendered without any preexisting obligation arising from contract or otherwise to the distressed ship or property; and (3) that the service was useful by effecting salvage of the ship or its cargo, in whole or in part. See The Sabine, 101 U.S. 384, 384 (1879); Brown v. Johansen, 881 F.2d 107, 109 (4th Cir. 1989).

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[2] Although the United States signed the United Nations Convention in 1994, the Senate has not yet provided the necessary advice and consent for ratification.

Upon rendering salvage service, a salvor obtains a lien in the saved property by operation of law to secure payment of compensation and award due from the property owner. See The Sabine, 101 U.S. at 386; see also Amstar Corp. v. S/S Alexandros T., 664 F.2d 904, 909 (4th Cir. 1981). This lien attaches to the property to the exclusion of all others, including the property's true owner. And to facilitate enforcement of the lien, the salvor enjoys a possessory interest in the property until the salvor is compensated. See S/S Alexandros T., 664 F.2d at 908-09. Because the salvor's lien is exclusive and prior to all others, so too, the salvor's possessory interest in the res is enjoyed to the exclusion of all others, including the res' true owner.

By rendering salvage service, the salvor thus acquires a limited property interest in the goods saved -- a first lien and exclusive possession -- until the salvor has been paid or his right against the property has been enforced. See The Emblem, 8 F. Cas. 611, 614 (D. Me. 1840); 3A Benedict on Admiralty § 143, at 10-8 (quoting The Emblem). While this interest attaches only to saved property, to protect a salvor's general salvage rights, a court of admiralty will protect the inchoate right of salvors in yet-to-be salved property for a reasonable period. See Treasure Salvors, Inc. v. The Unidentified Wrecked and Abandoned Sailing Vessel, 546 F. Supp. 919, 929 (S.D. Fla. 1981).

Although a salvor may enforce its claim for salvage service by filing an in personam action against the owner, the salvor may also execute on the lien which attached to the ship and its cargo by filing an in rem action. The lien can be enforced only through the institution of an in rem action, and the admiralty court exercises in rem jurisdiction only to enforce a maritime lien. Thus, "[t]he lien and the proceeding in rem are . . . correlative - where one exists, the other can be taken, and not otherwise." S/S Alexandros, 664 F.2d at 909 (internal quotation marks omitted); see also Fed. R. Civ. P. Supp. R. C(1). To execute on the lien, the court may order

the sale of the property, or, if a sale would yield an amount insufficient to fund an award to the salvor, the court may transfer title to the property to the salvor.

While the law of salvage provides substantial protection to salvors to encourage their saving of life and property at sea, it also imposes duties of good faith, honesty, and diligence in protecting the property in salvors' care. Thus, salvors have to exercise a trust over the property for the benefit of the owner and subject to any orders of a court. See The Barque Island City, 66 U.S. (1 Black) 121 (1861). In this vein, salvors are not entitled to remove property from the wreck for their own use or to use the property for their own use. When a violation of this trust occurs, the salvage claim is forfeited. See Danner v. United States, 99 F. Supp. 880 (S.D.N.Y. 1951). Indeed, it has been held that even when salvors have mistakenly misunderstood their rights and have taken property for their own use, they forfeited their right to a salvage award. See, e.g., id.; see also The Mable, 61 F.2d 537, 540 (9th Cir. 1932).

C

An in rem action, which is the most common process for enforcing a claim for salvage service, depends on the court's having jurisdiction over the res, the property which is named as defendant. See Pennoyer, 95 U.S. at 724. Only if the court has exclusive custody and control over the property does it have jurisdiction over the property so as to be able to adjudicate rights in it that are binding against the world. See Darlak v. Columbus-America Discovery Group, Inc., 59 F.3d 20, 22- 23 (4th Cir. 1995). Accordingly, to exercise in rem jurisdiction over a ship or its cargo, the ship or cargo must be within the district in which the in rem complaint is filed. See The Brig Ann, 13 U.S. (9 Cranch) 289, 291 (1815); see also Platoro Ltd., Inc. v. The Unidentified Remains of a Vessel, 695 F.2d 893 (5th Cir. 1983); see also

Fed. R. Civ. P. Supp. R. E(3) (providing that process in rem may only be served within the district).

While the res must be in custodia legis (in the court's possession), this possession may be actual or constructive. See The Brig Ann, 13 U.S. at 291. Constructive possession connotes something less than physical seizure of a res by a court. Just last term, for instance, the Supreme Court implicitly recognized the propriety of a district court's exercise of in rem admiralty jurisdiction over a shipwreck in California's territorial waters after a salvor presented "china, a full bottle of champagne, and a brass spike from the ship's hull" to the district court. See California v. Deep Sea Research, Inc., 118 S. Ct. 1464, 1467 (1998). The propriety of exercising in rem jurisdiction over an entire ship wreck within the court's territorial jurisdiction when only part of that wreck is actually presented to a court rests upon the fiction that the res is not divided and that therefore possession of some of it is constructively possession of all. See id. at 1473.

But when the res is not in the court's actual or constructive possession, traditional principles of in rem jurisdiction dictate that the court may not adjudicate rights to the res and effectively bind others who may have possession. See Pennoyer, 95 U.S. at 724; see also Fed. R. Civ. P. Supp. R. E(3). Consequently, a court could not exercise in rem jurisdiction, as traditionally understood, so as to vest rights in property outside of its territory, such as in a shipwreck lying in international waters. This conclusion is compelled by a recognition of the sovereign limits of the United States and the open nature of the high seas.

The sovereign limits of a nation are defined by those territorial boundaries within which it exercises supreme and exclusive power. Where a nation has boundaries contiguous to the high seas, international law defines the nation's sovereign limits by dividing navigable waters generally into three categories "distinguished by the nature of the control which the contiguous nation can exercise over them." United

States v. Louisiana, 394 U.S. 11, 22 (1969) (footnote omitted).

Navigable waters that lie inland of a nation's borders are within the nation's complete control as with any real property within its borders. See id.; see also The Schooner Exchange v. McFaddon, 11 U.S. (7 Cranch) 116, 136 (1812) (Marshall, C.J.) (stating that the "jurisdiction of the nation within its own territory is necessarily exclusive and absolute"). Likewise within the general sovereign sphere of a nation are its territorial waters, defined as those navigable waters lying up to 12 nautical miles beyond a nation's shoreline. See United States v. California, 332 U.S. 19, 35 (1947) (stating that the extension of our territorial jurisdiction "is but a recognition of the necessity that a government next to the sea must be able to protect itself from dangers incident to its location"). And beyond the territorial waters lie the high seas, over which no nation can exercise sovereignty. See Louisiana, 394 U.S. at 23; see also United States v. Louisiana, 363 U.S. 1, 33-34 (1960) (stating that the "high seas, as distinguished from inland waters, are generally conceded by modern nations to be subject to the exclusive sovereignty of no single nation"); California, 332 U.S. at 34 (stating that the United States, "throughout its existence has stood for freedom of the seas, a principle whose breach has precipitated wars among nations"); The Vinces, 20 F.2d 164, 172 (E.D.S.C. 1927) (stating that the high seas "are the common property of all nations"). The mutual access to the high seas is firmly etched into the jus gentium. See, e.g., United Nations Convention on the Law of the Sea, Dec. 10, 1982, 21 I.L.M. 1245, 1286-87 arts. 87, 89 (providing that the high seas shall be open to all nations and that "no State may validly purport to subject any part of the high seas to its sovereignty").[3]

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[3] Under the 1982 United Nations Convention, an exclusive economic zone is recognized, beginning at the outer limit of the territorial waters and extending to 200 nautical miles from the nation's shoreline. Within this economic zone, a nation may exercise exclusive

Any extension of jurisdiction into the high seas by a nation must be "subject to the consent of other nations." See Louisiana, 363 U.S. at 34; see also California, 332 U.S. at 35 (stating that "whatever any nation does in the open sea, which detracts from its common usefulness to nations, or which another nation may charge detracts from it, is a question for consideration among nations as such, and not their separate governmental units" (footnote omitted)). We do, however, acknowledge that the law of nations sanctions limited extraterritorial exercises of jurisdiction. See, e.g., Louisiana, 363 at 34 n.60 ("For example, the United States has long claimed the right to exercise jurisdiction over domestic and foreign vessels beyond the three-mile limit for purposes of customs control and for defense purposes and this practice is recognized by international law" (citations omitted)); Hudson & Smith v. Guestier, 10 U.S. (6 Cranch) 281, 284 (1810) (recognizing that a seizure of property on the high seas, beyond the territorial limits of all nations, for breach of a municipal revenue raising regulation is warranted by the jus gentium).

In sum, because the exercise of in rem jurisdiction depends on the court's exercise of exclusive custody and control over the res, the limits of in rem jurisdiction, as traditionally understood, are defined by the effective limits of sovereignty itself.

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control over economic matters involving fishing, the seabed, and the subsoil, but not over navigation. See United Nations Convention on the Law of the Sea, Dec. 10, 1982, 21 I.L.M. 1245, 1280, arts. 56(1), 57. Even though the United States has not yet ratified this treaty, see supra note 2, it generally recognizes this 200-mile economic zone. See Thomas J. Schoenbaum, 1 Admiralty and Maritime Law, § 2-16, at 35 (2d ed. 1994) (collecting legislation enacted by Congress in accordance with the Law of the Sea Convention).

VI

In applying these principles to a wreck lying in international waters, obvious complexities emerge. In rem jurisdiction, which depends on sovereignty over property, cannot be given effect to property beyond a nation's boundaries of sovereignty. See Pennoyer, 95 U.S. at 722 (stating "that every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory"). Where both persons and property are beyond a nation's zone of exclusive legal power, its ability to adjudicate rights as to them is limited, but not meaningless.

When nations agree on law to apply on the high seas, they agree to an order even beyond their sovereign boundaries which, while they hope will be honored on the high seas, can only be enforced completely and effectively when the people or property are brought within a nation's zone of power -- its sovereignty.

So it must be with the Titanic. The jus gentium, the law of all maritime nations, is easy to define and declare. But its enforcement must depend on persons or property involved in such a declaration coming into the zone of power of participating nations. We now turn to observe how these intersecting principles operate in this case.

A

First, Haver presents us with no reason to upset the district court's findings that RMST (and its predecessors) represented the first party successfully to salvage the wreck of the Titanic and that RMST has continued and plans to continue its substantial efforts. As the district court recognized, salvaging the wreck of the Titanic has presented a challenge of unprecedented proportion. Because the wreck lies under 2.5 miles of water, where there is virtually no light, the water is frigid, and the water pressure beyond general comprehension, only the most sophisticated

oceanographic equipment can explore the site and recover property. Doing so is time consuming, expensive, and dangerous.

Since 1993, RMST has overcome these challenges, conducting research and recovery expeditions in June 1993, July 1994, and August 1996. From these expeditions, it has been able to recover over 3,600 artifacts from the wreck and to gather thousands of photographs and hundreds of hours of video footage. As the district court observed, "RMST has exhibited considerable zeal as salvor in possession despite the fact that salvaging the wreck is extremely time-consuming, dangerous, and expensive." Titanic II, 9 F. Supp.2d at 627.

As the first successful salvor, RMST obtained an inchoate lien as a matter of law in the wreck as well as the artifacts from the wreck to enforce its claim for compensation and reward. And with its lien, RMST obtained the right to exclusive possession, not only of the artifacts removed from the wreck of the Titanic, but also of the wreck itself, so that no other person is entitled lawfully to intrude as long as salvage operations continue. See Treasure Salvors, Inc., 640 F.2d at 567.

Because RMST has necessarily acted on behalf of the owners of the property even if the owners did not or could not know of RMST's efforts, its interest in the property is limited to an exclusive possessory right, not for its own use, but for the purpose of bringing the property within the jurisdiction of a court in admiralty to enforce its maritime lien securing its claim for compensation and reward. But once the property is brought in custodia legis, the court can execute on RMST's lien and sell the property, or if the sale of the property would prove insufficient to compensate RMST fairly, the court can award title in the property to RMST.

These conclusions reached by the district court about RMST's rights are consistent with the salvage law which is part of the jus gentium, and we expect that whether RMST had returned property from the Titanic to an admiralty court

in England or France or Canada, the court would, by applying the same principles, have reached the same conclusions. The need for courts of admiralty to apply the law similarly is fundamentally important to international commerce and to the policies supporting order on the high seas. It is therefore prudent for us, as one such court sitting in admiralty, to assure enforcement in harmony with these shared maritime principles. And to this end, we are satisfied that to the extent the district court applied these principles, it acted in accordance with the jus gentium in awarding RMST exclusive salvage rights in the wreck of the Titanic.

B

Although the district court applied principles of the jus gentium to award RMST exclusive salvage rights in the Titanic, the question peculiar to this case remains how, if at all, can a court in admiralty enforce these salvage rights with respect to property that does not lie within its jurisdiction, nor, for that matter, within the jurisdiction of any admiralty court.

RMST argues, somewhat boldly and apparently without any direct legal authority, that an admiralty court can simply assert in rem jurisdiction over wrecks lying in international waters, beyond the territorial limits of the court's jurisdiction, and enter orders to enforce that jurisdiction. But this fails to account for the limits of courts' jurisdiction and, indeed, the limits of national sovereignty.

In rem jurisdiction is traditionally justified by the presence of the res within the jurisdiction of the court. Having exclusive legal custody over the res, whether actual or constructive, enables the court to issue orders respecting the res that are exclusive as against the whole world. With in rem jurisdiction, therefore, a court has the power, among others, to order the seizure, the sale, or the transfer of the res. It follows that when the res is outside the jurisdiction of the court, indeed, beyond the territorial limits of the United

States, the court cannot exercise in rem jurisdiction over it, at least in the traditional sense.

In this case, the district court recognized this limitation and rested its authority over the wreck of the Titanic on what it called "constructive in rem" jurisdiction. Obviously, any power exercised in international waters through "constructive in rem" jurisdiction could not be exclusive as to the whole world. For example, a French court could presumably have just as well issued a similar order at the same time with no less effect. But this non-exclusive control over the res would not defeat the district court's first purpose of declaring salvage rights to the wreck as against the world. In fact, we believe that the jus gentium authorizes an admiralty court to do so, even though the exclusiveness of any such order could legitimately be questioned by any other court in admiralty. The ultimate resolution could only occur at such time as property is removed from the wreck and brought within the jurisdiction of an admiralty court, giving it exclusive in rem jurisdiction over the property or when the persons involved in any dispute over the property are before the court in personam.

But this limitation on the jurisdiction exercised by the district court does not mean that its declaration with respect to the res was ineffective. We believe that the district court has a "constructive" -- to use the district court's term -- in rem jurisdiction over the wreck of the Titanic by having a portion of it within its jurisdiction and that this constructive in rem jurisdiction continues as long as the salvage operation continues. We hasten to add that as we use the term "constructive," we mean an "imperfect" or "inchoate" in rem jurisdiction which falls short of giving the court sovereignty over the wreck. It represents rather a "shared sovereignty," shared with other nations enforcing the same jus gentium. Through this mechanism, internationally recognized rights may be legally declared but not finally enforced. Final enforcement requires the additional steps of bringing either

property or persons involved before the district court or a court in admiralty of another nation.

Testing the effect of a United States court's attempt to assert exclusive jurisdictional power over property located beyond the territorial limits of the United States quickly brings a pragmatic response. When a nation seeks to exert sovereignty through exclusive judicial action in international waters, the effort prompts the obvious question of how the jurisdiction is to be enforced. But even beyond this pragmatic consideration lies the yet more significant consideration that asserting sovereignty through a claim of exclusive judicial action beyond the territorial limits of a nation would disrupt the relationship among nations that serves as the enforcement mechanism of international law and custom. What would occur if an English or French court were to exercise similar power? The necessary response to probes such as these leads to the now well-established norm of international law that no nation has sovereignty over the high seas. See, e.g., United Nations Convention on the Law of the Sea, Dec. 10, 1982, 21 I.L.M. 1245, 1287 art. 89 (providing that "no state may validly purport to subject any part of the high seas to its sovereignty").

This conclusion that no nation has sovereignty through the assertion of exclusive judicial action over international waters does not leave the high seas without enforceable law. The law of salvage as shared by the nations as part of the jus gentium applies to the high seas, and we are satisfied that it will do no violence to the relationship among nations to enforce these rights to the extent generally recognized on a non-exclusive basis. For this reason, we conclude that the district court was correct in declaring that RMST has salvage rights in the wreck of the Titanic and that these rights include the right exclusively to possess the wreck for purposes of enforcing the maritime lien that RMST obtained as a matter of law. It also follows that the district court acted properly in entering an injunction against persons over whom it had jurisdiction, prohibiting them from

interfering with the salvage efforts being pursued by RMST. We believe that these aspects of the district court's declaration and injunction would be recognized by all maritime nations and similarly be enforced by their courts.[4]

But we hasten to point out, again, that the power of an American court to enforce such orders is effectively limited until persons and property are brought within its territorial jurisdiction. These are limits that any court faces, regardless of the nation involved. Shared rights to the high seas may be exercised by all nations, and the assertion by any nation of exclusive sovereignty over a portion would interfere with those rights. This notion of "shared sovereignty" does not, however, preclude all nations from enforcing the internationally recognized laws of salvage in courts with respect to persons and property within their

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[4] In reaching this conclusion, we reject Haver's argument that the R.M.S. Titanic Maritime Memorial Act of 1986, 16 U.S.C. § 450rr et seq., precluded the district court from exercising jurisdiction over the wreck of the Titanic. That statute, while recognizing the "major national and international cultural and historical significance" of the Titanic, 16 U.S.C. § 450rr(a)(3), merely exists to encourage the United States (or more specifically, the President) to coordinate cooperative international efforts "for conducting research on, exploration of, and if appropriate, salvage of the R.M.S. Titanic." 16 U.S.C. § 450rr(b)(3). The statute also specifically expresses Congress' sense that "research and limited exploration activities concerning the R.M.S. Titanic should continue for the purpose of enhancing public knowledge of its scientific, cultural, and historical significance" pending the consummation of such international efforts. 16 U.S.C. § 450rr-5.

We also refuse to construe the language in § 450rr-6 of the statute -- "By enactment of sections 450rr to 450rr-6 of this title, the United States does not assert sovereignty, or sovereign or exclusive rights or jurisdiction over, or the ownership of, any marine areas or the R.M.S. Titanic" -- as stripping the federal courts of jurisdiction over the wreck for purposes of recognizing, consistent with the jus gentium, RMST as the wreck's exclusive salvor. Read in the context of the entire R.M.S. Titanic Memorial Act, we believe that language has no bearing in this appeal.

jurisdiction, nor even from exercising this form of shared sovereignty for matters on the high seas.

If we were to recognize an absolute limit to the district court's power that would preclude it, or essentially any other admiralty court, from exercising judicial power over wrecks in international waters, then we would be abdicating the order created by the jus gentium and would return the high seas to a state of lawlessness never experienced -- at least as far as recorded history reveals. We refuse to abdicate in this manner.

VII

While we affirm the district court's order enjoining Haver from interfering with the ongoing salvage operations of RMST, we must still address the additional terms to which he objects: (1) whether salvage rights include the right to exclude others from visiting, observing, and photographing the wreck; and (2) whether, in enjoining others from interfering with the ongoing salvage operations, the district court could exclude others from an area within a 10-mile radius (the 314-square mile circular area protected by its August 1996 order) or a 168-square mile rectangular area (protected by its June 1998 order), both of which lie entirely within international waters.

The June 1998 injunction provided in pertinent part:

> Until further order of this Court, these parties[including Haver] are ENJOINED from (i) interfering with the rights of RMST, as salvor in possession of the wreck and wreck site of the R.M.S. TITANIC, to exclusively exploit the wreck and wreck site, (ii) conducting search, survey, or salvage operations of the wreck or wreck site, (iii) obtaining any image, video, or photograph of the wreck or wreck site, and (iv) entering or

> causing anyone or anything to enter the wreck or wreck site with the intention of performing any of the foregoing enjoined acts.

Titanic II, 9 F. Supp.2d at 640. This injunction was a reiteration of the court's August 1996 injunction in which it, for the first time, explicitly prohibited others from photographing the wreck or wreck site of the Titanic. In entering the 1996 order, the court expanded traditional salvage rights to include the right to exclusive photographing of the wreck and the wreck site. The court explained:

> [I]f R.M.S. TITANIC is not selling artifacts like traditional salvors, it must be given the rights to other means of obtaining income. The court finds that in a case such as this, allowing another "salvor" to take photographs of the wreck and wreck site is akin to allowing another salvor to physically invade the wreck and take artifacts themselves.

The court pointed out that photographs could be marketed like any other physical artifact and therefore that the rights to record images of the Titanic belonged to RMST, the salvor in possession of the wreck.

The district court's expansion of salvage rights to include the right exclusively to photograph or otherwise record images of the wreck for the purpose of compensating salvors for their effort is both creative and novel. We are aware of no case in the United States or in the body of jus gentium, however, that has expanded salvage rights to include this type of a right. More importantly, we are not satisfied that the law of salvage would be properly extended to give salvors exclusive image recording rights in yet to be saved property. The underlying policy of salvage law is to encourage the voluntary assistance to ships and their cargo in distress. See, e.g., The Sabine, 101 U.S. 384;

Columbus-America, 974 F.2d at 459; The Akaba, 54 F. at 200. And the salvage service is useful to owners only when it effects a saving of the specific property at risk. The law does not include the notion that the salvor can use the property being salvaged for a commercial use to compensate the salvor when the property saved might have inadequate value. Traditionally, the inducement for salvage service is limited to the court's award of compensation and reward, which may be enforced in personam against the owner without regard to the property saved, or in rem against the property saved.

To award, in the name of salvage service, the exclusive right to photograph a shipwreck, would, we believe, also tend to convert what was designed as a salvage operation on behalf of the owners into an operation serving the salvors. The incentives would run counter to the purpose of salvage. Salvors would be less inclined to save property because they might be able to obtain more compensation by leaving the property in place and selling photographic images or charging the public admission to go view it.

Even if we were to assume that the salvors had full title to the yet to be recovered shipwreck, as would be the case if the law of finds were applied, it is doubtful that such title to property lying in international waters would include the right to exclude others from viewing and photographing it while in its public site. Exclusive viewing and photographing of property is usually achieved by exercising exclusive possession and removing the property to a private or controllable location where it cannot be viewed or photographed except under conditions controlled by the owner. But a property right does not normally include the right to exclude viewing and photographing of the property when it is located in a public place.[5]

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[5] For instance, even under American copyright law, where an architect has a copyright in the design of a building, that right does not extend to prevent the viewing and photographing of the building, if it is located at a public site or is visible from a public place. See 17 U.S.C. § 120(a).

In addition, if we were now to recognize, as part of the salvage law, the right to exclude others from viewing and photographing a shipwreck in international waters, we might so alter the law of salvage as to risk its uniformity and international comity, putting at risk the benefits that all nations enjoy in a well-understood and consistently applied body of law. This risk is heightened when it is understood that such an expansion of salvage rights might not encourage salvage and might, additionally, discourage free movement and navigation in international waters.

For these reasons, we conclude that the district court erred in extending the law of salvage to vest in RMST exclusive rights to visit, view, and photograph the wreck and wreck site of the Titanic at its location in international waters.

The district court's August 1996 injunction also prohibited anyone from entering within a 10-mile radius of the wreck site to search, survey, or obtain any image of the wreck or wreck site, and the court's June 1998 order prohibited anyone from entering, for a similar purpose, a rectangular area around the wreck site computed to be 168-square miles. Neither prohibition is justified by the law of salvage or allowed by the law of free navigation on the high seas. For the same reasons that we gave in denying exclusive viewing and photographing rights -- that to do so would alarmingly expand salvage law and interfere with the right of free navigation -- we also reverse these aspects of the district court's orders. This does not mean, however, that a court may not enforce salvage rights by prohibiting a party over whom it has personal jurisdiction from conducting salvage operations or interfering with the first salvor's exclusive possession of the wreck for purposes of salving it.

VIII

In summary, we conclude that this appeal presents us with a case or controversy as understood under Article III of the Constitution. We also consider DOE's appeal of the June 1998 injunction directed against it, even though DOE was not a party to the district court proceedings, and agree with DOE that the injunction against it is not enforceable because it was never made a party through proper service of process nor was it in privity with the party. We reject, however, Haver's personal jurisdictional challenge. With respect to Haver's challenge to the injunctions themselves, we affirm in part and reverse in part. We affirm the district court's injunctions insofar as they enjoin parties and persons in privity with them from conducting salvage operations of the Titanic wreck and interfering with the salvage operations of RMST. We reverse them insofar as they purport to prohibit the visiting, viewing, searching, surveying, photographing, and obtaining images of the wreck or the wreck site, as long as these activities do not constitute any salvage effort or interfere with RMST's salvage rights.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

R.M.S. TITANIC, INC., successor in interest to Titanic Ventures, limited partnership,

Plaintiff,

v.

THE WRECKED AND ABANDONED VESSEL, its engines, tackle, apparel, appurtenances, cargo, etc., Located within one (1) nautical mile of a point located at 41? >> 43' 32"' North Latitude and 49? 56' 49"' West Longitude, believed to be the R.M.S. TITANIC, in rem,

Defendant.

Action No. 2:93cv902

Entered: June 23, 1998

OPINION AND ORDER

This matter is before the Court on motion of R.M.S. Titanic, Inc. (RMST), acting as salvor in possession of Defendant wreck, for a preliminary injunction enjoining certain parties from visiting the wreck site to view and photograph the wreck. Since the Court has previously held that RMST's salvor in possession rights include the exclusive right to regulate access to the wreck site and photograph the wreck itself, the motion is essentially a request that the previous orders entered in this case be personalized and enforced against the new parties RMST seeks to enjoin. RMST's motion is granted.

I.

A.

RMST filed a Verified Complaint on August 26, 1993 requesting, among other things, an *in rem* arrest of the wreck of the R.M.S. TITANIC and that it be awarded the sole and exclusive salvage rights for the wreck. At a hearing held on August 27, 1993, RMST presented to the Court a wine decanter salvaged from the R.M.S. TITANIC wreck. *See* Transcript at 6 (Aug. 27, 1993). At that time numerous other artifacts were also within the judicial district. *See id.* By Order entered August 27, 1993, the Court found that "portions of the *in rem* Defendant are or shortly will be within this district during the pendency of this action ...." Order for Issuance of Warrant of Arrest at 1-2 (Aug. 27, 1993). The Court ordered that the United States Marshal arrest the wreck and artifacts already salvaged from the wreck pursuant to Supplemental Admiralty Rule C(2). [1] *Id.* at 2. Also by Order entered August 27, 1993, the Court substituted RMST for the United States Marshal as custodian of the wreck, wreck site, and artifacts. *See* Order Appointing Substitute Custodian at 2-3 (Aug. 27, 1993).

In early September 1993, notice of the *in rem* arrest was provided to other potential salvors by publication in three newspapers--*The Virginian-Pilot*, *The Wall Street Journal*, and *The Journal of Commerce*. Liverpool and London Steamship Protection and Indemnity Association (Liverpool and London) was the only party to file a claim. RMST and Liverpool and London subsequently entered into a settlement agreement, and the Court dismissed Liverpool

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[1] The Marshal physically arrested the artifacts and served the arrest warrant for the wreck itself on RMST's president who had been appointed substitute custodian and was the salvor who had possession of the wreck at that time. *See* Process Receipt and Return (docketed Sept. 1, 1993).

and London's claim with prejudice on June 7, 1994. *See* Dismissal Order (June 7, 1994).

By separate Order entered June 7, 1994, the Court awarded RMST salvor in possession status over the wreck and artifacts from the wreck. In the Order, the Court notes that following the 1993 *in rem* arrest and publication only Liverpool and London filed a claim against the Defendant and that claim was dismissed. *See* Order at 1 (June 7, 1994). The Order also states that the Court

> FINDS AND ORDERS that [RMST] is the salvor in possession of the wreck and wreck site of the R.M.S. Titanic, including without limitation, the hull, machinery, engine, tackle, apparel, appurtenances, contents and cargo, and that [RMST] is the true, sole and exclusive owner of any items salvaged from the wreck of the defendant vessel in the past and, so long as [RMST] remains salvor in possession, items salvaged in the future, and is entitled to all salvage rights ....

Id. at 2. Concerning other potential claimants who failed to heed the notice provided in the publication announcement of the *in rem* action, the Court ordered "that default judgment is entered against all potential claimants who have not yet filed claims and such claims are therefore barred and precluded so long as [RMST] remains salvor in possession ...." *Id.*

B.

In 1996, a competing salvor, John A. Joslyn, challenged RMST's status as salvor in possession. An evidentiary hearing was held from April 29 to May 1, 1996, at which the Court heard testimony and received evidence concerning RMST's salvage related activities.

By Order entered May 10, 1996, the Court reaffirmed RMST's status as salvor in possession. *See R.M.S. Titanic, Inc. v. Wrecked and Abandoned Vessel*, 924 F.Supp. 714, 722-24 (E.D.Va.1996). Finding that RMST had used due diligence in past salvage operations, planned ongoing and future salvage operations, and was clothed with the prospect of success in its salvage activities, the Court concluded that RMST "should remain the sole salvor in possession of the TITANIC wreck site ...." *Id.* at 724.

Joslyn then expressed an intention to visit the wreck-site solely to photograph the wreck. On August 9, 1996, the Court issued a Temporary Restraining Order against Joslyn's planned photographic expedition to the wreck. *See* Order (Aug. 9, 1996), *amended by*, Amended Order (Aug. 13, 1996). The Order states:

> The Court is of the opinion that its Order of May 10, 1996, while it did not specifically forbid photographing the wreck or the wreck site by other than [RMST], it did express in specific terms the need for [RMST] to have jurisdiction over the wreck site. This would include determining who could enter the site for any purpose and who could photograph the ship and the locale.

Id. at 1-2. The Temporary Restraining Order was against Joslyn, Blackhawk Television, and the R/V AKADEMIC MSTISLAV KELDYSH. *Id.*

By Order entered August 13, 1996, the Court converted the Temporary Restraining Order into a Preliminary Injunction Order. Joslyn, Blackhawk Television, the R/V AKADEMIC MSTISLAV KELDYSH, and "any other person having notice of this Order" were enjoined from "conducting search, survey, salvage operations, or obtaining any image or photograph of the TITANIC wreck or wreck site." Order at 2 (Aug. 13, 1996).

In the August 13, 1996 Order, the Court also made a legal conclusion that RMST's rights as salvor in possession include the sole and exclusive right to photograph the wreck. The Court noted that "video sales, film documentaries, and television broadcasts [are] inventive marketing ideas that [RMST] must resort to since it is not selling the artifacts [and][i]t is clear that the presence of another in the marketplace would diminish the rights the Court has granted [RMST]." *Id.* at 3. The Court found that "in a case such as this, allowing another 'salvor' to take photographs of the wreck and wreck site is akin to allowing another salvor to physically invade the wreck and take artifacts themselves." *Id.* at 4. Thus, the Court concluded that since "photographs can be marketed like any other physical artifact ... the rights to images, photographs, videos, and the like belong to [RMST]." *Id.* at 3.

Joslyn appealed the August 13, 1996 Preliminary Injunction Order to the Fourth Circuit Court of Appeals. The appeal was subsequently dismissed pursuant to a stipulation of dismissal filed by the parties. The Fourth Circuit "dismisse[d] th[e] appeal with prejudice pursuant to Rule 42(b) of the Federal Rules of Appellate Procedure ...." Order at 3 (4th Cir. Dec. 6, 1996).

C.

RMST's activities in salvaging the wreck have been commendable. Through its predecessor in interest and itself, RMST has conducted research and recovery expeditions at the wreck site in June 1987, June 1993, July 1994, and August 1996. It has current plans to conduct an expedition in August 1998. RMST has exhibited considerable zeal as salvor in possession despite the fact that salvaging the wreck is extremely time-consuming, dangerous, and expensive.

Salvaging the wreck of the R.M.S. TITANIC is time-consuming because it is impossible to conduct continuous, ongoing salvage operations at the wreck site. Year-round

salvage operations are impossible "[b]ecause of weather conditions at the site" in the stormy North Atlantic Ocean. *R.M.S. Titanic, Inc.*, 924 F.Supp. at 716 n. 3. "[S]alvage operations are only feasible during the months of June, July, and August." *Id.; see* Order at 1 (Aug. 13, 1996) (stating that "[t]he weather window for operations at the salvage site is very short").

Salvaging the wreck is dangerous and expensive because of its depth. The wreck "lies two-and-a-half miles below the ocean surface and the use of a manned submersible is required to reach it." *R.M .S. Titanic, Inc.*, 924 F.Supp. at 722. "This type of salvage operation is highly speculative and the expedition costs are high." *Id.* at 717. During the Preliminary Injunction Hearing on May 27, 1998, George Tulloch, RMST's president, testified that just the cost to charter a vessel and submersible for the 1998 expedition is $1,460,000. Transcript at 34 (May 27, 1998). Moreover, any artifacts that are recovered must be properly preserved and conserved at great expense. *See R.M.S. Titanic, Inc.*, 924 F.Supp. at 717 (discussing French conservation laboratory's cost to preserve artifacts and other costs of salvage for 1996 expedition).

Despite these considerable challenges, RMST has been very successful in salvaging the wreck. In 1987, RMST conducted 60 days of research and recovery operations at the wreck site. *See* RMST's Periodic Report at 4 (filed Nov. 12, 1997). It recovered approximately 1800 artifacts during the course of 32 dives. *Id.* It also produced approximately 140 hours of videotape footage and 7,000 still photographs from the wreck site. *Id.* During the summer 1993 expedition, RMST recovered 800 artifacts and produced approximately 105 hours of videotape footage during the course of 15 dives. *Id.* During the 1994 expedition, RMST recovered over 1,000 objects and produced 125 hours of videotape footage from the wreck site. *Id.* And in 1996, RMST recovered 74 objects and produced approximately 125 hours of videotape. *Id.* In its

May 10, 1996 Order, the Court found that "[t]o date, over 3,600 artifacts have been recovered from the wreck." *R.M.S. Titanic, Inc.*, 924 F.Supp. at 718.

RMST's onshore activities have also been exemplary. RMST cooperated with Discovery Communications, Inc. (The Discovery Channel) to produce three hours of television programing based on RMST's 1996 expedition. RMST's Periodic Report at 4-5 (filed Nov. 12, 1997). Two hours of the programing, presented in "Titanic: Anatomy of a Disaster," was the highest rated program in the history of The Discovery Channel when it aired in April 1997. *Id.*

In addition to this television documentary, RMST has exhibited artifacts from the R.M.S. TITANIC in museums in Norfolk, Virginia; Memphis, Tennessee; St. Petersburg, Florida; Long Beach, California; Hamburg, Germany; Stockholm, Sweden; Oslo, Norway; and Paris, France. *Id.* at 5-6; Transcript at 53 (May 27, 1998). Artifacts have also been displayed at the National Maritime Museum in Great Britain. RMST's Periodic Report at 7-8 (filed Nov. 12, 1997). During this exhibition, a record-breaking number of people visited the National Maritime Museum. *Id.*

RMST's current plans include continued world-wide museum exhibits, *id.* at 9, followed by the establishment of a permanent exhibition of all the artifacts at a museum somewhere in the United States. *Id.* RMST also plans future television documentaries from the R.M.S. TITANIC wreck site. *See* Transcript at 39-44 (May 27, 1998).

Other than receiving royalties from ticket sales at the various R.M.S. TITANIC artifact exhibits, RMST finances its continued operations through sales of licenses to third-parties for R.M.S. TITANIC artifact replicas, photographs, videos, wearing apparel, and other products. *See* RMST's Periodic Report at 19 (filed Nov. 12, 1997). With the exclusion of pieces of coal, RMST does not now, nor does it ever plan to, sell any artifacts for profit. *Id.* at 6, 7, 19; *see R.M.S. Titanic, Inc.*, 924 F.Supp. at 717.

D.

1.

RMST has learned about a planned commercial venture to provide members of the public with transportation to the wreck site and the opportunity to dive and photograph the R.M.S. TITANIC wreck for $32,500 per person. The commercial venture is planned and operated by Deep Ocean Expeditions, a newly formed company which has its office in the Isle of Man, Great Britain. *See* Exhibit 5 to Brief in Support of Motion for Preliminary Injunction (docketed May 11, 1998). Deep Ocean Expeditions was founded by Mr. Mike McDowell. *Id.* Connecticut-based travel firm Quark Expeditions and U.K.-based travel firm WildWings Worldwide Travel have issued promotional material for the photographic expedition. *See* Exhibits 4 and 5 to Brief in Support of Motion for Preliminary Injunction.

The promotional material states that the photographic expedition will take place in August 1998. *Id.* The expedition is further described as follows:

> Now for the first time in history, a limited number of adventurers are being invited to participate in a once-in-a-lifetime expedition entitled, OPERATION TITANIC. This world-class opportunity exists for you to join a seasoned team of professional scientists, film-makers, and explorers to accomplish the task of viewing and recording one of the world's most amazing sights ... the TITANIC.
>
> AS AN ACTIVE MEMBER OF THIS EXPLORATION, YOUR EXPEDITION INCLUDES ACTUALLY DIVING IN ONE

OF THE MIR SUBMERSIBLES TO THE TITANIC.

* * * * * *

Our expedition will be based aboard the AKADEMIK KELDYSH, which will act as 'mother ship' and support vessel for the MIR dive operation, as well as providing you with good quality accommodation and meals. The vessel will be located at the site of the TITANIC, which is about 368 miles to the south east of Newfoundland. KELDYSH will stay 'on site' during our expedition, with groups being moved back and forth using a suitable local boat from Newfoundland.

* * * * * *

Deep dives to the TITANIC (at 12,460 feet or 3775 meters) will take place on a daily basis, assuming that weather and sea conditions are favorable. These dives will be for participants in the expedition, such as yourselves, with separate dives for scientists and professional photographers, who will be recording the wreck.

* * * * * *

DEEP OCEAN EXPEDITIONS is planning and coordinating the OPERATION TITANIC expedition along with its colleagues and scientists from the P.P. SHIRSHOV INSTITUTE OF OCEANOLOGY located in Moscow. Both DEEP OCEAN EXPEDITIONS and all personnel from the

> SHIRSHOV INSTITUTE strongly believe that the integrity of the TITANIC wreck and the surrounding debris field should be respected both as a historical site as well as a gravesite. Therefore, both parties will categorically avoid any collection of artifacts or pieces of the wreck, neither interfacing with nor damaging the wreck in any way. In no way is OPERATION TITANIC planned or conceived as a collection expedition--the sole exception being the photographs and lasting memories participants will bring back with them to the surface.

Id. Exhibit 5.

The promotional material indicates that other than members of the paying public, the expedition will include the following people: Dr. Anatoly Sagaievitch of the P.P. Shirshov Institute of Oceanology in Moscow, Dr. Alfred S. McLaren, Dr. Don Walsh, and Ralph White. *Id.* To dive on the wreck, the expedition will use Soviet made MIR submersibles based on the R/V AKADEMIK MSTISLAV KELDYSH. *Id.*

Lastly, the promotional material acknowledges RMST's salvor in possession rights. To this end, the material states: "Both DEEP OCEAN EXPEDITIONS and the SHIRSHOV INSTITUTE also recognize that there is a 'salvor in possession' claim recognized by an American Court under Admiralty Law, awarded to a U.S. company R.M.S. TITANIC INC." *Id.*

2.

On May 4, 1998, RMST filed a motion for preliminary injunction in its *in rem* salvage action to prevent Deep Ocean Expeditions from visiting the wreck site and

photographing the wreck. RMST requests that the Court enter an order directed to:

> Deep Ocean Expeditions, WildWings Worldwide Travel and its parent company Bakers World Travel, Quark Expeditions, Inc., Mike McDowell, Ralph White, Don Walsh, Ph.D., Alfred S. McLaren, Ph.D., the R/V AKADEMIK MSTISLAV KELDYSH, and their agents, servants, employees and all person in active concert and participation with them, prohibiting them from entering within ten (10) nautical miles of the wreck of the TITANIC for any purpose, and directing specifically that they shall not take photographs or make visual images of the wreck or wreck site using film or videotape, and further directing them not to interfere in any way with the salvage expedition under the direction of RMST at the wreck site in August and September, 1998 ....

Motion for Preliminary Injunction at 1-2 (May 4, 1998).

Also on May 4, 1998, Christopher S. Haver filed a separate *in personam* action against RMST seeking a declaratory judgment that he has the right to enter the wreck site and photograph the wreck of the R.M.S. TITANIC. *See* Complaint for Declaratory Judgment at 4-5, *Haver v. R.M.S. Titanic, Inc.*, No. 2:98cv507 (E.D.Va. May 4, 1998). He avers that he has signed up with Deep Ocean Expeditions and intends to pay the $32,500 for transportation to the wreck. *Id.* at 3. He also avers that he wants to photograph and videotape the wreck solely for his own personal use and does not intend to recover any part of the wreck. *Id.* at 4.

On May 11, 1998, RMST filed an Amended Motion for Preliminary Injunction to include Haver in the list of

persons it seeks to enjoin from visiting and photographing the wreck. *See* Amended Motion for Preliminary Injunction at 1 (May 11, 1998).

By Order entered May 12, 1998, the Court consolidated Haver's declaratory judgment action "with and into" the *in rem* salvage action because it "involves the same issues which are currently being litigated" in the *in rem* action. Order at 1 (May 12, 1998).

3.

On May 27, 1998, the Court conducted a hearing on RMST's motion for a preliminary injunction. RMST presented documentary evidence that all the parties it seeks to enjoin received notice of its motion for a preliminary injunction and notice of the hearing date. *See* Plaintiff's Exhibits 3, 4, & 5.[2] Haver was the only defendant to make an appearance to contest RMST's motion.[3] Based on RMST's evidence, the Court finds that all of the persons and entities whom RMST seeks to enjoin have received sufficient notice of its motion and the hearing date.

At the hearing, RMST called George H. Tulloch as a witness to give testimony in support of a preliminary

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[2] Notice of the hearing date was not physically delivered to Deep Ocean Expeditions and Mike McDowell because there was no one at their address when delivery of the notice was attempted. *See* Transcript at 105 (May 27, 1998). Nevertheless, the Court finds that Deep Ocean Expeditions and Mike McDowell had sufficient notice of the hearing to satisfy Fed.R.Civ.P. 65(a)(1). About the same time the delivery company was unsuccessfully attempting to deliver the hearing notice, Mike McDowell sent a letter to Haver on Deep Ocean Expeditions' letterhead. *See* Haver Exhibit 1. In the letter, McDowell indicates his knowledge that Haver was seeking court permission to participate in Deep Ocean Expeditions' planned voyage to the R.M.S. TITANIC. *Id.* Deep Ocean Expeditions and Mike McDowell could have easily obtained the date and time of the hearing from Haver.

[3] Haver did not appear in court himself; he sent counsel.

injunction. Tulloch is the president of RMST. Transcript at 30 (May 27, 1998). He testified that RMST plans to be on the site salvaging the wreck during the entire month of August 1998. *Id.* at 31. They do not plan to leave the site until September 2, 1998. *Id.* at 78.

Tulloch also testified and introduced documentary evidence that RMST is chartering a French research vessel and submersible for the summer 1998 expedition from the Institute of France for the Research and Exploration of the Sea (IFREMER). *Id.* at 33-36; Plaintiff's Exhibit 1. RMST has already paid IFREMER $200,000 in down payment towards the $1,460,000 charter cost. [4] Plaintiff's Exhibit 1.

Tulloch further testified about RMST's plans for the summer 1998 expedition. It plans to recover a piece of the R.M.S. TITANIC's hull that has broken off from the rest of the wreck, *see* Transcript at 37, recover the Marconi transmitter, *id.* at 37-38, explore and salvage a newly discovered debris field that is high in content of fine china, *id.* at 38, and recover the B deck door on the port side that has fallen into the debris field examined in 1996. *Id.* Also RMST, in conjunction with The Discovery Channel, will attempt a live television broadcast from the wreck site on August 16, 1998, at 9 p.m. eastern time. *Id.* at 39. [5] The broadcast will feature live video and audio from the wreck. *Id.* Before this live broadcast, National Broadcasting Company (NBC) will air a special on the 1998 expedition on its "Date Line" program on August 13, 1998. *Id.* at 43. Furthermore, RMST is planning to take the first optical images of the wreck in color. *Id.* at 43. It will also map a

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[4] RMST has used IFREMER's equipment and vessels during all its previous salvage operations on the R.M.S. TITANIC. Transcript at 36.

[5] RMST's licensing contract with The Discovery Channel is worth approximately $6 million to the company. *See* Transcript at 42.

significant portion of the wreck with videos and photographs. *Id.* at 42.

RMST plans to have multiple ships, submersibles, and remote operating vehicles at the wreck site during its operations. *Id.* at 43-45. In order to carry out its planned salvage operations and practice for the photographic and video broadcasts it will carry out dive operations 24 hours a day. *Id.* at 45.

Tulloch testified that if another vessel outside of their expedition was on the site shuttling tourists down to the wreck, it would threaten their operations. *Id.* at 48. Tulloch does not believe that it would be safe for two submersibles to be exploring the wreck at the same time. *Id.* RMST would therefore be forced to stop its operations if another vessel and submersible were on the site. *Id.*

IFREMER has also expressed concern about competing submersibles diving the wreck at the same time. IFREMER considers it a "safety hazard to dive with other submersibles in the area of the wreck." *Id.* at 51; Plaintiff's Exhibit 2. It will not allow its submersible to dive on the wreck if other submersibles are in the area. Transcript at 49. Moreover, IFREMER "will expect charter hire to be paid by [RMST] to IFREMER" even if the presence of another submersible at the wreck site causes IFREMER to cease operations. *Id.* at 51; Plaintiff's Exhibit 2.

Tulloch testified that the summer 1998 expedition is very important to RMST because of its timing. With the public interest heightened as a result of the ongoing artifact exhibits and the movie about the R.M.S. TITANIC, RMST is in a unique position to capitalize on the 1998 expedition. Transcript at 52. The Discovery Channel live television broadcast and NBC "Date Line" special will only enhance the public's awareness and knowledge of the wreck. Thus, the 1998 expedition is important for RMST's future artifact exhibits, licensing arrangements, and operations in general. *Id.* 52-53. "The opportunity is extremely broad for us at this

moment to capitalize on [the wreck's publicity] as an educational, scientific and entertainment tool." *Id.* at 54.

Concerning public photographic expeditions to the wreck site, Tulloch testified that RMST has considered charging tourists for photographic trips to the wreck. *Id.* at 65. RMST has not yet, however, added tourist cruises and dives to its salvage plans because of safety concerns. *Id.* 65-66. Tulloch did not rule out the possibility that RMST will offer the public the chance to dive on and photograph the wreck in the future. *Id.* at 66.

In response to RMST's evidence, Haver presented a Declaration of Christopher S. Haver. *See* Haver Exhibit 1. Attached to the declaration is a letter from Mike McDowell to Haver stating that Deep Ocean Expeditions has some flexibility in scheduling and may move its expedition into September or dive during the evening hours when it is anticipated that RMST will not be conducting operations. *Id.*

After RMST objected to the admission of the McDowell letter as hearsay, the Court expressed its concern that offering this evidence in the form of a declaration and unsworn letter deprived RMST of its right of cross-examination. Transcript at 107. The Court received the affidavit and letter into evidence for a "limited purpose." *Id.* It was the Court's conclusion then, and still is now, that the facts contained in the letter from McDowell to Haver may not be relied upon because the letter is not written under oath and McDowell was not present at the hearing for cross-examination. *Id.*

On June 2, 1998, Haver filed a Supplemental Declaration. The supplemental declaration again cites to an unsworn letter from McDowell to Haver and states in pertinent part as follows:

> Mr. McDowell informed me that he also had just learned for the first time that RMST planned an August expedition, and that, because of safety concerns, Deep Ocean

> Expeditions and the P.P. Shirshov Institute would reschedule their expedition to September once they could establish with certainty that [RMST] would be diving on the wreck in August.

Supplemental Declaration of Christopher Haver (June 2, 1998). The Court views this declaration with even more skepticism than the declaration that was introduced during the preliminary injunction hearing. McDowell received a copy of RMST's motion and supporting memorandum for a preliminary injunction that stated RMST's plans for an August 1998 expedition. *See* Plaintiff's Exhibit 4. He has likewise been in contact with Haver, who himself is well aware of RMST's salvage plans. Thus, a claim by McDowell that he just learned about RMST's plans to be on the site in August 1998 lacks credibility. In any event, even if Haver's declarations are believed, all he has proven is that Deep Ocean Expeditions *may* reschedule its operations until September to avoid RMST's expedition. And this is in contrast to Deep Ocean Expeditions' promotional material stating that the trip will take place in August. Given this conflict, the Court finds that the photographic expedition is planned for August 1998--the same time RMST will be on the site conducting salvage operations. [6]

II.

Haver asserts three challenges to this Court's jurisdiction and ability to enter a preliminary injunction in this action. These issues will be addressed initially.

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[6] The Court also notes that as a mere paying customer, Haver has no say in when or how Deep Ocean Expeditions conducts its operations.

A.

First, Haver challenges this Court's jurisdiction over the wreck and wreck site. He claims that the Court's *in rem* jurisdiction is defective because the original warrant for arrest was not served upon the vessel within the judicial district.

1.

[1] [2] Throughout the pendency of this salvage case, the Court has exercised constructive *in rem* jurisdiction over the wreck itself based on the presence within the judicial district of physical items salvaged from the wreck. [7] It is settled salvage law that United States District Courts have jurisdiction to adjudicate salvage claims based on salvage operations that occur on the high seas. *See Treasure Salvors, Inc. v. Unidentified, Wrecked and Abandoned Sailing Vessel,* 640 F.2d 560, 566-67 (5th Cir.1981); *The John Gilpin,* 13 F. Cas. 675, 676 (S.D.N.Y.1845). Practicalities sometimes dictate the impossibility of bringing the entire ship into a judicial district at any one time for salvage adjudication. *See Marex Int'l, Inc. v. Unidentified, Wrecked and Abandoned Vessel,* 952 F.Supp. 825, 828 (S.D.Ga.1997); *Moyer v. Wrecked and Abandoned Vessel, a/k/a Andrea Doria,* 836 F.Supp. 1099, 1104 (D.N.J.1993); *Treasure Salvors, Inc. v. Unidentified, Wrecked and Abandoned Sailing Vessel,* 569 F.2d 330, 335 (5th Cir.1978). For instance, in this case the

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[7] The Court first exercised constructive *in rem* jurisdiction over the R.M.S. TITANIC in 1992. *See Marex Titanic, Inc. v. Wrecked and Abandoned Vessel, R.M.S. TITANIC,* 805 F.Supp. 375, 376, 378 (E.D.Va.1992), *rev'd on non-jurisdictional grounds,* 2 F.3d 544 (4th Cir.1993). The Court subsequently ordered the rearrest of the wreck at the request of RMST in August 1993. *See* Order at 1-2 (Aug. 27, 1993).

depth of the wreck of the R.M.S. TITANIC, along with its historical importance, compels meticulous and calculated salvage work over many salvage seasons. Despite these obstacles, however, the law of salvage demands the protection of the first salvor in possession from interference during the pendency of his salvage operations. *See Hener v. United States*, 525 F.Supp. 350, 357 (S.D.N.Y.1981) (stating that "[a] salvor will frequently seek the right to salvage without interference, and the law will grant such an exclusive right if the first salvor's effort is ongoing and has a 'fair prospect of success' "); *The AMERICAN FARMER*, 80 Lloyd's Rep. 672 (1947) (stating that "a principle which is always acted upon in this Court is that a subsequent salvor is not entitled to dispossess a prior salvor"); *The John Gilpin*, 13 F. Cas. 675, 676 (S.D.N.Y.1845) (No. 7345) (stating that the first salvors "had a right to retain [possession] until the salvage was completed, and no other person could interfere against them forcibly"); *The Hendry Ewbank*, 11 F. Cas. 1166, 1170-71 (C.C.D.Mass.1833) (No. 6376) (Story, J., stating that "[n]o other persons, without [the first salvor's] consent, could intrude themselves upon that possession, or gain a title to be deemed co-salvors").

[3] [4] The constructive *in rem* arrest allows an admiralty court to properly administer the salvage of a wreck and protect the salvor in possession when it is impossible to bring the entire wreck into the judicial district at a single point in time. *See Marex Int'l, Inc.*, 952 F.Supp. at 828 (wreck located 18 nautical miles east of Myrtle Beach, South Carolina); *Bemis v. RMS Lusitania*, 884 F.Supp. 1042, 1044 (E.D.Va.1995) (wreck located 12 miles off the coast of Ireland), *aff'd*, 99 F.3d 1129 (4th Cir.1996), *cert. denied*, --- U.S. ----, 118 S.Ct. 1558, 140 L.Ed.2d 791 (1998); *Columbus-America Discovery Group, Inc. v. Unidentified, Wrecked and Abandoned Sailing Vessel*, 742 F.Supp. 1327, 1333-34 (E.D.Va.1990) (wreck located 160 miles off the coast of South Carolina), *rev'd on other grounds*, 974 F.2d 450 (4th Cir.1992), *cert. denied*, 507 U.S. 1000, 113 S.Ct.

1625, 123 L.Ed.2d 183 (1993). When a salvor in possession brings part of a wreck into an admiralty court for *in rem* arrest, he has proven his salvor status and perfected a maritime lien that is only enforceable in an *in rem* action. *See The Sabine*, 101 U.S. 384, 384-85, 25 L.Ed. 982 (1879) (stating that a salvage lien attaches when a salvor has been successful "in whole or in part"); *The Brig Ann*, 13 U.S. (9 Cranch) 289, 291, 3 L.Ed. 734 (1815) (stating that the *res* "is constructively [within the court's possession] when, by a seizure, it is held, to ascertain and enforce a right or forfeiture which can alone be decided by a judicial decree *in rem*."). The salvor in possession is thereafter entitled to protection from rival salvors and others who might interfere with his ongoing operations. *See Hener*, 525 F.Supp. at 357; *The AMERICAN FARMER*, 80 Lloyd's Rep. 672; *The John Gilpin*, 13 F. Cas. at 676; *The Henry Ewbank*, 11 F. Cas. at 1170-71.

[5] On August 27, 1993, as proof of its ability and intention to salvage the wreck of the R.M.S. TITANIC, RMST presented to the Court a wine decanter salvaged from the wreck. *See* Transcript at 6 (Aug. 27, 1993). In its arrest order, the Court found that "portions of the *in rem* Defendant are or shortly will be within this district during the pendency of this action ...." Order at 1-2 (Aug. 27, 1993). This language parallels the language of Supplemental Admiralty Rule C which authorizes an *in rem* action when the res "is within the district or will be during the pendency of the action." Supplemental Admiralty Rule C(2). The arrest papers were served on the portions of the *in rem* Defendant within the district and on RMST as substitute custodian and salvor who had possession of the wreck. *See* Order at 1-2 (Aug. 27, 1993); Process Receipt and Return (docketed Sept. 1, 1993). Thus, the Court assumed *in rem* jurisdiction over those portions of the R.M.S. TITANIC within the judicial district and constructive *in rem* jurisdiction over the R.M.S. TITANIC wreck site. This constructive *in rem*

jurisdiction serves merely to protect RMST from interference in its ongoing salvage operations. [8]

A recognized assumption in an *in rem* action is that a physical arrest of the *res* places those who have an interest in the *res* on notice of the *in rem* proceeding. *See The Mary*, 13 U.S. (9 Cranch) 126, 144, 3 L.Ed. 678 (1815). Thus, persons having an interest in the wine decanter that was actually arrested received notice of this action when the United States Marshal arrested it. To notify potential claimants about the *in rem* action against the wreck itself, the rules require, and in this action the Court ordered, publication of the arrest in various newspapers. *See* Supplemental Admiralty Rule C(4); E.D. Va. Local Admiralty Rule (c)(3); Order for Issuance of Warrant of Arrest at 3 (Aug. 27, 1993). Publication in a newspaper gives notice to the world of the *in rem* action. *See Darlak v. Columbus-America Discovery Group*, 59 F.3d 20, 22 (4th Cir.1995), *cert. denied*, 516 U.S. 1094, 116 S.Ct. 817, 133 L.Ed.2d 761 (1996) (holding that competing salvor was too late in asserting a claim after the liability phase of the proceedings were complete). If notice is provided "in a newspaper of general circulation," *id.* at 23 n. 6, "[t]he whole world, it is said, are parties in an admiralty cause; and, therefore, the whole world is bound by the decision." *Id.* at 22-23 (quoting *Thorsteinsson v. M/V DRANGUR*, 891 F.2d 1547, 1553 (11th Cir.1990)); *see The Mary*, 13 U.S. (9 Cranch) at 144. In September 1993, RMST published notice of the *in rem* action in *The Virginian-Pilot, The Wall*

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[8] Haver alleges that other than the original wine decanter, no salvaged artifacts are within the judicial district. Many of these artifacts are being exhibited in museums around the world, *see supra* pt. I. C., or are in France being conserved. Nevertheless, all the artifacts are within the possession of RMST or its agents as the Court's substitute custodian. *See* Order Appointing Substitute Custodian at 2-3 (Aug. 27, 1993). The Court maintains *in personam* jurisdiction over RMST and could order RMST to move all the artifacts into the judicial district if necessary to satisfy any competing ownership or salvage claim.

Street Journal, and *The Journal of Commerce*. Consequently, for admiralty law purposes the whole world had notice that rights to the wreck of the R.M.S. TITANIC were being litigated in this Court. Any current claim of ignorance to the *in rem* salvage action is necessarily foreclosed.

2.

[6] Exercise of *in rem* jurisdiction for the purpose of salvaging the wreck of the R.M.S. TITANIC is consistent with international law. It is undisputed that the wreck lies in international waters. Under the 1982 Law of the Sea Convention, international waters--or the high seas--are free to all states, *see* Law of the Sea Convention of 1982, Art. 87, and no state may exercise sovereignty over any part of the high seas, *see id.* Art. 89. Yet, these rules must be harmonized with the internationally recognized rules of salvage.[9]

Salvage law recognizes a salvor's "right to equitable remuneration." Salvage Convention of 1910, Art. 2; *The Sabine*, 101 U.S. at 384-85. It recognizes the priority of the first salvor. *See The TUBANTIA*, 18 Lloyd's List L. Rep. 158, 161 (1924); *Twenty-Three Bales of Cotton*, 24 F. Cas. 419 (E.D.N.Y.1877) (No. 14,284). It recognizes the right of the salvor in possession to complete his salvage work free of interference by rivals. *See Hener*, 525 F.Supp. at 357; *The AMERICAN FARMER*, 80 Lloyd's Rep. 672; *The John Gilpin*, 13 F. Cas. at 676; *The Henry Ewbank*, 11 F. Cas. at

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[9] The law of salvage is an integral part of the general maritime law, *see The Blaireau*, 6 U.S. (2 Cranch) 240, 264, 2 L.Ed. 266 (1804), which is itself considered to be part of the *jus gentium*. *See The Belgenland*, 114 U.S. 355, 362, 5 S.Ct. 860, 29 L.Ed. 152 (1885) (stating that "salvage is a question of *jus gentium* "); Gilmore, *The Law of Admiralty* s 8-1 (2d ed.1975). *Jus gentium* is the law of nations--"[t]hat law which natural reason has established [and] all nations use." *Black's Law Dictionary* 997 (4th ed.1968).

1170-71. It recognizes the salvor's right to bring the *res* into a convenient port to adjudicate the salvage lien. *See The La Bruce*, 14 F. Cas. 905 (Super.Fla.1837) (No. 7963). Essentially, therefore, the internationally recognized principles governing salvage on the high seas encourage the exercise of *in rem* jurisdiction over a wreck site to facilitate the salvage operation itself. *See* Norris, 3A *Benedict on Admiralty* s 1 (7th ed.1997).

The Court finds that the exercise of constructive *in rem* jurisdiction over the R.M.S. TITANIC wreck site to facilitate RMST's salvage operations is reasonable under international law. *See* Restatement (Third) of Foreign Relations Law s 403 (proscribing the exercise of extra-territorial jurisdiction that is "unreasonable"). RMST has brought part of the wreck into this Court seeking to be appointed sole salvor in possession under generally recognized salvage law. It is in the interest of the whole world to have salvage claims decided in a single forum so that multiple, conflicting litigation is avoided. The whole world is placed on notice of the action in this Court by the publication of notice of the *in rem* arrest. Moreover, the recognized international rights at stake are minimally infringed upon. Restricting freedom of navigation over a few square miles of the vast North Atlantic Ocean is hardly a significant intrusion. [10]

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[10] This case highlights the quandary of a salvor on the high seas when he is unable to bring the entire ship into any one port at any given time. At the preliminary injunction hearing, RMST's president testified that RMST took steps with the Minister of the Sea in France to file a salvage action there. Transcript at 77 (May 27, 1998). After weighing its options, RMST elected to invoke the jurisdiction of this Court rather than proceed with the salvage case in France. *Id.; cf. The La Bruce*, 14 F. Cas. at 905 (recognizing the salvor's right to choose a convenient port and forum in which to adjudicate its salvage lien).

B.

[7] Haver next claims that this Court may not enjoin him from visiting the wreck site because he is not a party to the salvage action. This assertion is incorrect.

Haver filed an *in personam* action against RMST seeking a declaratory judgment that he has the right to visit the wreck site to take photographs. *See* Complaint for Declaratory Judgment, *Haver v. R.M.S. Titanic, Inc.*, No. 2:98cv507 (E.D.Va. May 4, 1998). By Order entered May 12, 1998, the Court consolidated his declaratory judgment action "with and into" the *in rem* salvage action because it "involves the same issues which are currently being litigated" in the *in rem* action. Order at 1 (May 12, 1998). Thus, Haver is a party to the *in rem* action. In addition, the Court retains *in personam* jurisdiction over Haver because he has filed an action in this Court.

Yet, for the purpose of RMST's preliminary injunction motion, this point is irrelevant. RMST has properly moved for a motion for a preliminary injunction against Haver. Haver has been served with notice of the motion and has appeared by counsel in opposition to the motion. He may not now claim that the Court has no authority to enjoin him. *See* Fed.R.Civ.P. 65(a)(1) (requiring bare "notice to the adverse party" before an injunction may be issued).

C.

[8] Third, Haver claims that no preliminary injunction may issue because RMST has not filed a new complaint with the Court. He argues that when this Court awarded RMST salvor in possession status, it closed the *in rem* action. Now, Haver argues, a new complaint must be filed by RMST against Haver and the others RMST wants to enjoin for a preliminary injunction to issue.

Haver's argument fails because the *in rem* action is not over. As long as the salvor in possession continues to salvage the *in rem* Defendant, the Court has jurisdiction to litigate claims to that Defendant and award salvage rights to the salvor. The *in rem* case is not over until all claims--salvage or otherwise--are resolved. *See* Order at 3-4 (Apr. 1, 1996) (holding that a competing salvor had standing to challenge RMST's salvor in possession status and the Court had discretion to reconsider its previous orders in the *in rem* salvage action). Since the salvor is still performing salvage operations, the *in rem* case is still pending, and an injunction may properly issue pursuant to the Federal Rules of Civil Procedure.

III.

[9] Haver's declaratory judgment request and RMST's motion for a preliminary injunction both involve one question of law that the Court has previously resolved in the *in rem* action--whether salvor in possession rights include the right to exclude others from visiting the wreck site to photograph the wreck. In an Order entered August 13, 1996, the Court decided this issue in the affirmative and preliminarily enjoined various parties from visiting the wreck site to photograph the wreck. Order at 3-5 (Aug. 13, 1996). The Court's conclusion was based upon two grounds.

First, the salvor in possession has a right to salvage the wreck free from the interference of others. In a case of historical and archeological salvage, interference may take two forms--interference with the salvor's active operations and interference with the wreck itself. If a photographic expedition is on the site at the same time RMST plans to carry on salvage operations, RMST may be forced to abort its salvage plans in the interests of safety. Next, "[i]t is obvious to the Court that because of the darkness caused by the depth and location of the TITANIC one would have to

get very close to the wreck and on the site with powerful lights in order to take photographs ...." Order at 3 (Aug. 13, 1998). Because photographers must work so close to the wreck, there is a significant risk of interference with or injury to the wreck itself. *See* Transcript at 59 (Aug. 12, 1996) (the Court stating that "there's been no evidence here that anybody can take a picture in two and-a-half miles depth of water without getting into the site, which the court said was exclusively under the right and direction of [RMST]"). This has the potential of spoiling the historical and archeological value of the wreck itself, [11] which the salvor in possession has a duty to protect. *See* Law of the Sea Convention of 1982, Arts. 149 and 303; *Columbus-America Discovery Group v. Atlantic Mut. Ins. Co.*, 974 F.2d 450, 468 (4th Cir.1992), *cert. denied*, 507 U.S. 1000, 113 S.Ct. 1625, 123 L.Ed.2d 183 (1993); *Marex Int'l v. Unidentified, Wrecked and Abandoned Vessel*, 952 F.Supp. 825, 829 (S.D.Ga.1997).

The second rationale for excluding third-party photographers involves allowing RMST to at least recoup its investment in the salvage operations. [12]

> [RMST] has expended time, efforts, money, and ingenuity over a period of approximately nine years in locating the wreck, starting

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[11] An example of spoilation of the R.M.S. TITANIC wreck occurred in 1996 when RMST found and recovered a propeller protector from a modern submersible on the wreck and observed damage to the wreck caused by the propeller protector. *See* Affidavit of P.H. Nargeolet (Exhibit 1 to RMST's Brief in Support of Motion for Preliminary Injunction).

[12] Chief Justice Marshall instructively states the policy of allowing "a very ample compensation for" salvage services in *The Blaireau*, 6 U.S. (2 Cranch) 240, 266, 2 L.Ed. 266 (1804). An award "very much exceeding the mere risk encountered and labor employed in effecting them, is intended as an inducement to render them, which is for the public interests, and for the general interests of humanity ...." *Id.*

> salvage operations, and continuing salvage operations. The Court granted [RMST] possession of the wreck site for monetary gain in order to compensate it for these efforts and to encourage their continuation.
>
> * * * * * *
>
> Further, this is not the ordinary salvage case. The TITANIC has special historical significance and the Court recognizes the efforts of [RMST] in both preservation of the artifacts and its willingness not to sell the artifacts, thereby keeping them together in the public interest. In this "historical salvage" case, the Court finds that it is desirable to keep these artifacts together for the public display and, therefore, traditional salvage rights must be expanded for those who properly take on the responsibility of historic preservation. *MDM Salvage, Inc. v. The Unidentified, Wrecked and Abandoned Sailing Vessel,* 631 F.Supp. 308 (S.D.Fla.1986). This ruling is consistent with the importance the Fourth Circuit has given to the archeological and historical preservation efforts of a salvage operation such as that of the TITANIC. *Columbus-America Discovery [Group] v. Atlantic Mut. Ins.*, 974 F.2d 450 (4th Cir.1992), citing with approval *MDM Salvage.* Therefore, if [RMST] is not selling artifacts like traditional salvors, it must be given the rights to other means of obtaining income.

Order at 3-4 (Aug. 13, 1996). The Court concluded that it "is of the opinion that photographs can be marketed

like any other physical artifact and, therefore, the rights to images, photographs, videos, and the like belong to [RMST]." *Id.* at 3.

The legal conclusion that RMST's salvor in possession rights encompass and include the right to exclude third-party photographers from the wreck site has not been reversed on appeal. The Fourth Circuit summarily dismissed the appeal of the August 13, 1996 Order "with prejudice." Order at 3 (4th Cir. Dec. 6, 1996). The Fourth Circuit issued no opinion and formulated no legal conclusions on the issue. Consequently, at least in this Court, this legal conclusion has become law of the case. *See Illinois v. Illinois Cent. R.R. Co.*, 184 U.S. 77, 91, 22 S.Ct. 300, 46 L.Ed. 440 (1902); *Sejman v. Warner- Lambert Co.*, 845 F.2d 66, 68-69 (4th Cir.1988), *cert. denied*, 498 U.S. 810, 111 S.Ct. 43, 112 L.Ed.2d 19 (1990); *Dodd v. Union Indem. Co.*, 32 F.2d 512 (4th Cir.), *cert. denied*, 280 U.S. 581, 50 S.Ct. 33, 74 L.Ed. 631 (1929).

IV.

[10] RMST moves for entry of a preliminary injunction forbidding third-parties from visiting the wreck site to photograph the wreck. The motion is granted.

A.

In this Circuit, "a hardship balancing test applies to determine the granting or denial of a preliminary injunction." *Direx Israel, Ltd. v. Breakthrough Medical Corp.*, 952 F.2d 802, 812 (4th Cir.1991). That test, first announced in *Blackwelder Furniture Co. v. Seilig Mfg. Co.*, 550 F.2d 189 (4th Cir.1977), demands the consideration of four factors:

> (1) the likelihood of irreparable harm to the plaintiff if the preliminary injunction is denied,

(2) the likelihood of harm to the defendant if the requested relief is granted,

(3) the likelihood that the plaintiff will succeed on the merits, and

(4) the public interest.

Direx Israel, Ltd., 952 F.2d at 812.

In assessing these factors, the irreparable harm to the plaintiff and defendant are the most important. *Id.* Also, RMST bears the burden of establishing the four factors in support of granting an injunction. *Id.*

B.

Irreparable harm to RMST. If no preliminary injunction is entered, RMST will suffer irreparable harm in several respects. The unrefuted evidence at the preliminary injunction hearing was that RMST planned to conduct 24 hour salvage operations at the site throughout the month of August 1998. Notwithstanding Haver's declarations that Deep Ocean Expeditions *may* reschedule its expedition until September, Deep Ocean Expeditions' promotional material indicates that the photographic expedition will take place in August. If the photographic expedition is on the site in August, RMST will be precluded from conducting its salvage operations for safety reasons and could lose a salvage season. Such a loss would be detrimental to RMST since it is trying to capitalize on the current public relations boon that has resulted from its past efforts to publicize the wreck and the R.M.S. TITANIC movie.

If RMST is forced to cancel or reschedule its salvage operations because of the presence of the photographic expedition at the wreck site, it will also incur substantial monetary losses. RMST has a web of contracts and

agreements in place that are all dependent upon the 1998 salvage expedition. T[illegible]ost important of these are the charter agreement with [illegible]MER worth almost $1.5 million and the licensing rights with The Discovery Channel and NBC worth $6 million. While this money is certainly compensable in a court of law,[13] Haver and the others RMST seeks to enjoin have made no showing that they would be able to pay a judgment in excess of $7.5 million.

Lastly, despite admonitions in the promotional literature to the contrary, the Court is concerned that the Deep Ocean Expeditions operation will tamper with the wreck itself. [14] Any intentional or unintentional alteration of the wreck site will disrupt RMST's meticulous salvage operations and efforts to historically catalog the wreck.

Irreparable harm to defendants. Haver and the other people RMST seeks to enjoin have made an insufficient evidentiary showing concerning the irreparable harm they will suffer if enjoined. Haver is the only non-movant to produce any evidence of irreparable injury. His first declaration states that his "sole purpose in participating in [the photographic] expedition is to experience this unique adventure to observe firsthand the most famous shipwreck of all time. [He] believe[s] that this opportunity to observe the

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[13] *See Hughes Network Systems, Inc. v. InterDigital Communications Corp.*, 17 F.3d 691, 694 (4th Cir.1994) ("Where the harm suffered by the moving party may be compensated by an award of money damages at judgment, courts generally have refused to find that harm irreparable.").

[14] The Court's concern is justified because at some point before RMST's summer 1996 expedition, a MIR submersible dove on and damaged the wreck. During its 1996 expedition, RMST recovered the propeller protector from one of the two MIR submersibles based on the R/V AKADEMIK MSTISLAV KELDYSH and observed damage to the wreck caused by the dislodged propeller protector. *See* Affidavit of P.H. Nargeolet (Exhibit 1 to RMST's Brief in Support of Motion for Preliminary Injunction). The same submersible could have the same mishap if it returns to the wreck in 1998 with tourists aboard.

wreck of the *Titanic* is unparalleled and irreplaceable." Haver Exhibit 1. Haver's supplemental declaration avows similar nostalgic injury: "if I cannot participate in an expedition conducted by Deep Ocean Expeditions, I will not be able to view the *Titanic* as it rests on the floor of the North Atlantic Ocean at all." Supplemental Declaration of Christopher S. Haver at 2 (June 2, 1998).

Even if barred from personally diving on the wreck, participants in the photographic expedition will have the opportunity to view and experience the R.M.S. TITANIC when RMST and The Discovery Channel air their live television broadcast from the wreck site in August 1998. Haver and the others will save the $32,500 expedition cost by staying home and watching The Discovery Channel's production. Furthermore, in balancing the alleged sentimental harm of failing to view and photograph the wreck "firsthand" against RMST's harm of losing a salvage season, losing the exclusive rights to license photographs of the wreck for fees, and having the wreck tampered with, the Court finds that RMST's harm significantly outweighs any harm to the photographic expedition. RMST has been professionally salvaging the wreck since at least 1987. It has invested significant time and resources into its operations during this time period. Even comparing RMST's harm with the quixotic harm of a band of adventure tourists borders on the irrational.

Success on the merits. The Court finds that RMST will likely succeed on the merits of this issue because as a matter of law its salvor in possession rights include the exclusive right to exclude others from the wreck site and the exclusive right to photograph, video, and take images of the wreck of the R.M.S. TITANIC. *See supra* pt. III.

Public interest. The Court finds that it is in the public interest for RMST to continue to salvage the wreck without interference from others. Indeed, a fundamental principle of salvage law--as it is applied by all commercial and sea-going nations--is that a salvor in possession has an

exclusive right to complete his job unhindered by others. *See* Gilmore, *The Law of Admiralty* s 8-1 (2d ed.1975); *Hener*, 525 F.Supp. at 357; *The AMERICAN FARMER*, 80 Lloyd's Rep. 672; *The TUBANTIA*, 18 Lloyd's List L. Rep. at 161; *The John Gilpin*, 13 F. Cas. at 676; *The Henry Ewbank*, 11 F. Cas. at 1170-71.

Haver cites the R.M.S. Titanic Maritime Memorial Act of 1986 (the Act), 16 U.S.C. s 450rr *et seq.*, and argues that Congress has determined that it is in the public interest for him to photograph the wreck, while it is not in the public interest for RMST to salvage the wreck. The Act requests that the Executive Branch enter into negotiations with Canada, France, Great Britain, and other interested countries for a treaty and international guidelines to govern the wreck site. *See* 16 U.S.C.A. ss 450rr-3, 450rr-4 (West 1992). [15] The Act then states that

> [i]t is the sense of Congress that research and limited exploration activities concerning the R.M.S. Titanic should continue for the purpose of enhancing public knowledge of its scientific, cultural, and historical significance: Provided, That, pending adoption of the international agreement described in section 450rr-4(a) of this title, or implementation of the international guidelines described in

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[15] The Act "direct[s]" the Executive Branch to enter into these negotiations. 16 U.S.C.A. s 450rr-3. When he signed the measure, President Ronald Reagan issued a formal statement supporting the purpose of the Act but taking issue with the language requiring the Executive Branch to exercise its foreign affairs powers. "If interpreted literally, these requirements would contravene my constitutional authority to conduct foreign relations." Statement by President Ronald Reagan Upon Signing S.2048, 22 Weekly Comp. Pres. Doc. 1421, 1986 U.S.C.C.A.N. 4074 (Oct. 21, 1986). Thus, "[t]o avoid this constitutional difficulty," the Executive Branch has always "viewed" the provisions of the Act "as discretionary." *Id.*

> section 450rr-3 of this title, no person should conduct any such research or exploration activity which would physically alter, disturb, or salvage the R.M.S. Titanic.

16 U.S.C.A. s 450rr-5. Immediately following this section, Congress disclaims any extra-territorial sovereignty over the wreck site by stating that "the United States does not assert sovereignty, or sovereign or exclusive rights or jurisdiction over, or the ownership of, any marine areas of the R.M.S. Titanic." 16 U.S.C.A. s 450rr-6.

No treaty, as envisioned by the Act, has ever been negotiated. The Executive Branch invited other nations to enter into such negotiations but received no interest. *See* Letter from J. Edward Fox, Asst. Secretary of State to Chairman, House Committee on Merchant Marine and Fisheries, dated Aug. 10, 1987 (Exhibit 8 to RMST's Rebuttal Brief in Support of Motion for Preliminary Injunction). Moreover, it does not appear that negotiations will ever begin. *See id.* Twelve years have gone by since the Act was passed and no negotiations have ensued. Meanwhile, the wreck is in international waters and no country or combination of countries has territorial jurisdiction over it. The only law that governs is the internationally recognized principles of admiralty and maritime law (including the law of salvage).

Consequently, we are left with (i) a world-famous historic shipwreck, (ii) advancing technology that results in easier access to that shipwreck, (iii) numerous undersea explorers, salvage companies, and thrill-seekers who desire to exploit the wreck, and (iv) no international agreement or enforceable rules to govern that exploitation. The Act does nothing to address or resolve these competing interests. Salvage law, however, provides policies and rules that do address these interests. *See, e.g., Hener,* 525 F.Supp. at 358 (stating that salvage law's "application enables courts to encourage open, lawful, and cooperative conduct, all in the

cause of preserving property (and life)."). To determine the public interest, the Court will therefore revert to the policies underlying salvage law and other international rules governing the treatment of shipwrecks having historical significance.

"[T]he saving of imperiled maritime property" is and always has been in the public interest. Norris, 3A *Benedict on Admiralty* s 1 (7th ed.1997); *see* Schoenbaum, 2 *Admiralty and Maritime Law* s 16-1 (2d ed. 1994) ("The law of marine salvage developed in response to important social policies, to encourage efforts to save property ..."); Gilmore, *The Law of Admiralty* s 8-1 (2d ed. 1975) ("Public policy ... encourages the hardy and adventurous mariner to engage in" salvage service). The ancient and modern salvage cases demonstrate that it is beneficial for a single salvor to return imperiled property to its owner. *See R.M.S. Titanic, Inc.*, 924 F.Supp. at 719; *Columbus-America Discovery Group*, 974 F.2d at 460-61; *MDM Salvage, Inc.*, 631 F.Supp. at 311-12; *Hener*, 525 F.Supp. at 357; *The TUBANTIA*, 18 Lloyd's List L. Rep. at 161; *The John Gilpin*, 13 F. Cas. at 676; *The Henry Ewbank*, 11 F. Cas. at 1170-71.

Modern international law and salvage law also encourage the preservation of a shipwreck's archaeological and historical integrity.

> All objects of an archeological and historical nature found in the Area [i.e., the high seas] shall be preserved or disposed of for the benefit of mankind as a whole, particular regard being paid to the preferential rights of the State or country of origin, or the State of cultural origin, or the State of historical and archeological origin.

Law of the Sea Convention of 1982, Art. 149; *see also id.* Art. 303 (concerning historical and archeological artifacts salvaged from a state's contiguous zone). Courts

administering salvage law recognize these policies and reward the salvor who preserves or enhances the historical value of a wreck. *See, e.g., Columbus-America Discovery Group,* 974 F.2d at 468.

In this case, RMST is salvaging and preserving the artifacts salvaged from the wreck for the benefit of all mankind. While RMST is a for-profit corporation, it views its role in salvaging the wreck as more of a scientific and educational undertaking than a capitalist enterprise. George Tulloch, RMST's president, testified that he believes RMST maximizes shareholder value "[b]y doing your first four jobs the best that they can be done. Recover, conserve, exhibit, and protect the wreck. Money will take care of itself after that if I have done it well and used professionals every step of the way." Transcript at 71 (May 27, 1998). RMST is not exploiting the wreck for profit. *See R.M.S. Titanic, Inc.*, 924 F.Supp. at 717. It does not sell artifacts. After it properly treats and preserves recovered artifacts, it places them in world-wide museum exhibits for the whole world to see. *See* RMST's Periodic Report at 5-8 (filed Nov. 12, 1997). Moreover, after it is finished its work on the R.M.S. TITANIC, RMST plans to house all the artifacts in one museum for the benefit of all mankind. *Id.*

In accord with salvage law, the Court finds that it is in the public interest for a single salvor to salvage the wreck of the R.M.S. TITANIC. RMST has been appointed as the single salvor. It is doing an acceptable job of salvaging the wreck in its deep ocean environment, maximizing the wreck's historical value, and returning the wreck's artifacts to society for the general use and education of all mankind. Thus, it is in the public interest for RMST to continue its operations unhindered.

Deep Ocean Expeditions' planned photographic expedition will only serve to disrupt RMST's operations and devalue RMST's salvor in possession rights. It will disrupt RMST's operations because a safety hazard arises when more than one expedition conducts dive operations at the

site. Furthermore, if Deep Ocean Expeditions is granted leave for its photographic excursion, the disruption will not end there. All others who wish to conduct the same activity will assert the same right. This could result in multiple photographic excursions to the wreck site each year with no practical way for RMST to police the activities of the participants. Everyone says that they will only take pictures and will not salvage artifacts. Yet, artifacts are strewn across a large area of ocean floor and represent a great temptation for souvenir hunting photographers. Lastly, RMST's salvor in possession rights will be devalued if the photographic expedition is allowed because the exclusive right to photograph the wreck is included in those salvor in possession rights. Adventure tourists should be paying RMST for the right to dive on and photograph the wreck rather than Deep Ocean Expeditions. Likewise, people who purchase photographs of the R.M.S. TITANIC should be purchasing photographs from RMST (a repeat salvor) and not from someone else who visits the wreck one time. Accordingly, the Court finds that it is not in the public interest for Deep Ocean Expeditions to visit the wreck site and photograph the wreck.

C.

When the four *Blackwelder* factors are considered as a whole, the clear conclusion is that a preliminary injunction should be entered. Accordingly, the Court issues a preliminary injunction against Christopher Haver, Deep Ocean Expeditions, WildWings Worldwide Travel and its parent company Bakers World Travel, Quark Expeditions, Inc., Mike McDowell, Ralph White, Don Walsh, Ph.D., Alfred S. McLaren, Ph.D., the R/V AKADEMIK MSTISLAV KELDYSH, all their agents and employees, and anyone else having notice of this Opinion and Order. Until further order of this Court, these parties are ENJOINED from (i) interfering with the rights of RMST, as salvor in

possession of the wreck and wreck site of the R.M.S. TITANIC, to exclusively exploit the wreck and wreck site, (ii) conducting search, survey, or salvage operations of the wreck or wreck site, (iii) obtaining any image, video, or photograph of the wreck or wreck site, and (iv) entering or causing anyone or anything to enter the wreck or wreck site with the intention of performing any of the foregoing enjoined acts. The wreck site encompasses a zone of rectangular shape, bound by the following points: 41? 46' 25"' North Latitude, 050? 00' 44"' West Longitude, then east to 41? 46' 25"' North Latitude, 049? 42' West Longitude, then south to 41? 34' 25"' North Latitude, 049? >> 42' West Longitude, then west to 41? 34' 25"' North Latitude, 050? 00' 44"' West Longitude, then returning north to the start. Nothing in this Opinion and Order shall be construed as restricting customary rights of surface navigation on the high seas which do not otherwise violate the specific restrictions set forth above.

D.

Federal Rule of Civil Procedure 65(c) states that no preliminary injunction should be issued unless security is posted by the applicant "in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained." The clear language of this rule places the amount of a bond within the sound discretion of the district court. *Wilson v. Office of CHAMPUS,* 866 F.Supp. 903, 910 (E.D.Va.1994).

Haver and the other enjoined parties have offered no evidence of what their damages would be if wrongfully enjoined. The Court can only surmise that such damages would be minimal and speculative. Furthermore, these damages are very unlikely to be compensable because RMST has demonstrated that it is likely to succeed on the

merits. The Court therefore assesses a bond of $0, with no surety required.

The Clerk is **DIRECTED** to send a copy of this Opinion and Order to counsel for Haver, counsel for RMST, and to those parties enjoined.

IT IS SO ORDERED.

/s/_____
UNITED STATES DISTRICT JUDGE

Norfolk, Virginia
June 23, 1998

R.M.S. TITANIC, INC., successor in interest to Titanic Ventures, limited partnership,
Plaintiff,

v.

The WRECKED AND ABANDONED VESSEL, its engines, tackle, apparel, appurtenances, cargo, etc., located within one nautical mile of point located 41 degrees 43' 32" North Latitude and 49 degrees 56' 49" West Longitude, believed to be RMS Titanic, in rem.,
Defendant.

Civ. A. No. 2:93CV902.

United States District Court,
E.D. Virginia, Norfolk Division.

Entered: Aug. 13, 1996.

Mark Steven Davis, Fred Bradford Stillman, David Michael Young, McGuire, Woods, Battle & Booth, Norfolk, VA, for R.M.S. Titanic, Inc.

ORDER

CLARKE, District Judge.

On August 12, 1996 the Court heard argument on plaintiff, R.M.S. Titanic's, Motion for a preliminary injunction and for the reasons stated from the bench the Court granted the injunction. The Court made its ruling from the bench because of the need for prompt action. The weather window for operations at the salvage site is very short. When delivering its decision from the bench, the Court advised counsel that it would prepare and file a short

written opinion today and perhaps a more formal and lengthy opinion after Labor Day.

On plaintiff, R.M.S. Titanic's, Motion for preliminary injunction, judgment is entered in favor of the plaintiff. In granting plaintiff's motion, the Court is ruling in consistency with its two previous orders regarding the TITANIC. On June 7, 1994 the Court entered judgment in favor of R.M.S. Titanic granting it exclusive salvor-in-possession rights of the TITANIC wreck and wreck site. On May 10, 1996 the Court denied Joslyn, the principal opposing party in the present action, his motion requesting rescission of the June 7, 1994 Order. In the May 1996 Order, the Court concluded that R.M.S. Titanic should remain the sole salvor in possession of the TITANIC wreck and wreck site.

The principal parties involved in the May 1996 action are now before the Court in a dispute involving a proposed photographic expedition that Joslyn wants to conduct at the wreck site. R.M.S. Titanic is being granted a preliminary injunction barring Joslyn, Blackhawk Television, L.L.C., R/V AKADEMIK MSTISLAV KELDYSH, and any other person having notice of this Order, actual or otherwise from conducting search, survey, salvage operations, or obtaining any image or photography of the TITANIC wreck or wreck site.

In issuing a preliminary injunction the Court is following the balance-of-hardship test outlined in Blackweller Furn. Co., Etc. v. Seilig MFG. CO., Inc., 550 F.2d 189, (4th Cir. 1977). The test is as follows: (1) likelihood of irreparable harm to the plaintiff without an injunction; (2) likelihood of harm to the defendant with an injunction; (3) plaintiff's likelihood of success on the merits; and (4) the public interest. Id. The Fourth Circuit has also stated that if in balancing the likelihood of irreparable harm to both parties "a decided imbalance of hardship should appear in plaintiff's favor, likelihood of success test is displaced by formulation that it is ordinarily enough that plaintiff has raised questions going to the merits so serious,

substantial, difficult and doubtful as to make them fair ground for litigation." Id.

In the present case, the Court believes that irreparable harm would come to the plaintiff if injunctive relief were denied and this finding results in a decided imbalance of hardship in plaintiff's favor. R.M.S. Titanic has expended time, efforts, money, and ingenuity over a period of approximately nine years in locating the wreck, starting salvage operations, and continuing salvage operations. The Court granted R.M.S. Titanic possession of the wreck site for monetary gain in order to compensate it for these efforts and to encourage their continuation. The Court is of the opinion that photographs can be marketed like any other physical artifact and, therefore, the rights to images, photographs, videos, and the like belong to R.M.S. Titanic.

It is obvious to the Court that because of the darkness caused by the depth and location of the TITANIC one would have to get very close to the wreck and on the site with powerful lights in order to take photographs and, therefore, this activity is prohibited by the Court's two previous orders granting R.M.S. Titanic possession of the wreck site. The activity Joslyn contemplates is exactly the type of activity the Court contemplated in its May 1996 Order giving R.M.S. Titanic exclusive possession. The Court specifically referred to video sales, film documentaries, and television broadcasts as inventive marketing ideas that R.M.S. Titanic must resort to since it is not selling the artifacts. It is clear that the presence of another in the marketplace would diminish the rights the Court has granted R.M.S. Titanic.

Further, this is not the ordinary salvage case. The Titanic has special historical significance and the Court recognizes the efforts of R.M.S. Titanic in both preservation of the artifacts and its willingness not to sell the artifacts, thereby keeping them together in the public interest. In this "historical salvage" case, the Court finds that it is desirable to keep these artifacts together for the public display and, therefore, traditional salvage rights must be expanded for

those who properly take on the responsibility of historic preservation. MDM Salvage, Inc. v. The Unidentified, Wrecked and Abandoned Sailing Vessel, 631 F.Supp. 308 (S.D.Fla. 1986). This ruling is consistent with the importance the Fourth Circuit has given to the archeological and historical preservation efforts of a salvage operation such as that of the TITANIC. Columbus-America Discovery v. Atlantic Mut. Ins., 974 F.2d 450 (4th Cir. 1992), citing with approval MDM Salvage. Therefore, if R.M.S. Titanic is not selling artifacts like traditional salvors, it must be given the rights to other means of obtaining income. The Court finds that in a case such as this, allowing another "salvor" to take photographs of the wreck and wreck site is akin to allowing another salvor to physically invade the wreck and take artifacts themselves.

Joslyn, in an affidavit contended that he would suffer a loss in the neighborhood of $2,500,000.00 if he were enjoined from photographing the wreck and the wreck site. The Court found that the affidavit lacked credibility in light of his statements in an earlier discovery deposition. The Court finds that Joslyn was present at the May hearing and heard testimony regarding R.M.S. Titanic's plans to film a documentary, and to sell videos after this Court's order of May 10, 1996. Apparently, he then decided to charter a vessel for the same type of activity. Joslyn was advised that R.M.S. Titanic took the position that the Court's Order gave R.M.S. Titanic exclusive rights to photograph the wreck site. Joslyn could have come before the Court and asked for a clarification of the Court's order before incurring any expenses in relation to a photographic expedition.

CONCLUSION

The Court finds that R.M.S. Titanic would be the most harmed if injunctive relief were denied. It has incurred extraordinary expenses on this project and has spent years exercising its salvage rights. Furthermore, R.M.S. Titanic

has established by a preponderance of the evidence that it has the exclusive right to take any and all types of photographic images of the TITANIC wreck and wreck site. Accordingly, the Court enters judgment in favor of R.M.S. Titanic granting a preliminary injunction.

R.M.S. Titanic is required to post a bond in zero amount with surety. The Court finds Joslyn's affidavit claiming a loss if an injunction were issued completely inadequate and lacking in credibility. The Court finds that a bond with zero penalty and without surety is justified.

The Clerk is directed to mail a copy of the Order to all counsel.

IT IS SO ORDERED.

R.M.S. TITANIC, INC., successor in interest to Titanic Ventures, limited partnership,

Plaintiff,

v.

The WRECKED AND ABANDONED VESSEL, its engines, tackle, apparel, appurtenances, cargo, etc., Located within one (1) nautical mile of a point located at 41? >>> 43' 32"' North Latitude and 49? 56' 49"' West Longitude, believed to be The RMS Titanic, in rem,

Defendant.

Civil Action No. 2:93cv902.

United States District Court,
E.D. Virginia,
Norfolk Division.

Entered: May 10, 1996

Competing salvor filed motion seeking rescission of order naming salvor in possession of the Titanic. The District Court, Clarke, J., held that salvor in possession demonstrated that its efforts were undertaken with due diligence, were ongoing, and were clothed on prospect for success, and thus was entitled to maintain its status.

Motion denied.

F. Bradford Stillman, Mark S. Davis, David M. Young, McGuire, Woods, Battle & Boothe, Norfolk, VA, for Plaintiffs, R.M.S. TITANIC, INC., etc. Jonathan M. Epstein, James T. Shirley, Jr., Haight, Gardner, Poor & Havens, Washington, DC, Lawrence G. Cohen, Anne B. Shumadine, Mezzullo & McCandlish, Norfolk, VA, for John A. Joslyn, Movant.

MEMORANDUM OPINION AND ORDER

CLARKE, District Judge.

At issue before the Court is a challenge to its Order of June 7, 1994, granting salvor-in-possession status to R.M.S. Titanic, Inc. For the reasons stated from the bench and elaborated on more fully below, the Court's ruling from the bench being made a part hereof, the Court DENIES Joslyn's Motion requesting a rescission of the June 7, 1994 Order.

I. PROCEDURAL HISTORY

On August 23, 1993, RMS Titanic, Inc. (RMST) filed a verified complaint asking the Court to declare it to be the sole and exclusive owner of any items salvaged from the RMS TITANIC (TITANIC).[1] As required by the Court, notice to other potential salvors and interested parties was given via publication. Liverpool and London Steamship Protection and Indemnity Association (LLSP) was the only party to file a claim. RMST and LLSP subsequently entered into a settlement agreement, and the Court dismissed LLSP's claim with prejudice. Because there were no other outstanding claims against the vessel, the Court entered an

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[1] A previous action was filed in this Court on August 7, 1992 by Marex Titanic, Inc., a salvor wholly unrelated to RMST. RMST's predecessor in interest, Titanic Ventures, L.P., filed a motion to vacate arrest and dismiss the complaint and a verified motion for preliminary injunction. On October 13, 1992, the Court entered an order finding Titanic Ventures to be the salvor in possession of the wreck site; this judgment was subsequently reversed by the Fourth Circuit on other grounds. *Marex Titanic, Inc. v. The Wrecked and Abandoned Vessel, RMS TITANIC*, 805 F.Supp. 375 (E.D.Va.1992), *rev'd on other grounds*, 2 F.3d 544 (4th Cir.1993). Because the dismissal of the action also dismissed the portion of the order granting Titanic Ventures salvor-in-possession status, RMST, as successor in interest, refiled a claim for exclusive salvage rights in 1993.

Order on June 7, 1994, conferring salvor-in-possession status of the TITANIC to RMST and granting it the exclusive rights over any items salvaged from the TITANIC while it remained salvor in possession. [2]

Following the entry of this Order, RMST successfully completed a salvage expedition to the TITANIC during the 1994 "weather window."[3] On August 10, 1994, RMST presented its *Periodic Report of Salvor in Possession on the Progress of Recovery Operations* to the Court. The Court entered an Order filing the Periodic Report, and also noted that RMST had previously conducted successful salvage operations in June of 1987 and June of 1993. Order of Aug. 10, 1994. While the present action was pending in this Court, RMST filed a second periodic report.

On February 20, 1996, John A. Joslyn (Joslyn or Intervenor) filed a motion pursuant to Rule 60(b) of the Federal Rules of Civil Procedure asking the Court to rescind its order naming RMST salvor in possession of the TITANIC. Joslyn claimed that RMST's status should be rescinded because it has failed to diligently salvage the

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[2] The Court's Order provided that:

> RMS Titanic, Inc. is the salvor in possession of the wreck and wreck site of the RMS TITANIC, including without limitation, the hull, machinery, engine, tackle, apparel, appurtenances, contents and cargo, and that RMS Titanic, Inc. is the true, sole and exclusive owner of any items salvaged from the wreck of the defendant vessel in the past and, so long as RMS Titanic, Inc. remains salvor in possession, items salvaged in the future, and is entitled to all salvage rights, and that default judgement is entered against all potential claimants who have not yet filed claims and such claims are therefore barred and precluded so long as RMS Titanic, Inc. remains salvor in possession....Order of June 7, 1994.

[3] Because of weather conditions at the site, salvage operations are only feasible during the months of June, July, and August.

TITANIC, has evidenced no intention to salvage it in the future, and, at this time, is financially incapable of utilizing its rights. In its response, in addition to refuting Joslyn's claims, RMST asserted that Joslyn had no standing to bring his motion. Thus, before the Court could hear the merits of the claim, the Court was obliged to resolve the issue of the Joslyn's standing. By Order of April 1, 1996, the Court held that Joslyn did have standing and that, even if he did not, the Court had the power to reconsider its prior Order either *sua sponte* under Rule 60(b) of the Federal Rules of Civil Procedure or under its inherent power to modify and interpret its original order. *See* Order of Apr. 1, 1996.

An evidentiary hearing was held from April 29 to May 1, 1996. The Court heard testimony from a number of witnesses concerning both RMST's salvage-related activities since its 1994 expedition and RMST's present financial situation. Because the summer "weather window" was approaching and a quick determination of the parties' status was necessary, the Court ruled from the bench after closing arguments. The Court more fully discusses the basis for its ruling below.

II. FINDINGS OF FACT

A. RMS Titanic, Inc.

RMST, the present salvor in possession of the RMS TITANIC is incorporated in Florida and is a public corporation with sixteen million outstanding shares. The largest shareholders of RMST include Titanic Ventures Limited Partnership (TVLP) (with approximately 43% of the shares), Mr. Arnold Geller (with approximately 12% of the shares), and Mr. William Gasparrini (with approximately 12% of the shares). TVLP, the largest shareholder, is a Connecticut limited partnership with one general partner and fifteen limited partners. Another corporation, Oceanic

Research and Exploration (ORE), a Delaware corporation, is the general partner of TVLP. [4]

Mr. George Tulloch, the current president of RMST, testified that since its inception, RMST has lost $9.8 million.[5] RMST also has a number of outstanding liens and encumbrances against certain TITANIC artifacts. A Virginia law firm has a lien against two artifacts located in Virginia for legal services rendered. These two artifacts are to be exhibited in the Tidewater, Virginia area until the attorneys' fees are paid. RMST also has an agreement with Electricité de France (EDF), the conservator of the 1987 artifacts, which gives EDF the right to exhibit fifteen TITANIC artifacts for ten years in lieu of collecting $70,000.00 which RMST still owes EDF for its conservation work.

In addition to the attorneys' fees owed for litigation over salvage rights, RMST has also been a party in at least two other actions. Although one of these lawsuits has been dropped, RMST's potential liability in the other is unclear.

Additionally, RMST has a number of outstanding debts. It still owes money to LP3, a conservation laboratory in France, for past conservation efforts. Moreover, Mr. Stéphane Pennec, the director of LP3, testified that to merely store and preserve the artifacts currently at LP3 will cost RMST an additional $23,000.00. RMST also has a few "friendly" debts, which their creditors are not collecting at

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[4] In March of 1996, Joslyn and another individual brought suit in Delaware concerning the ownership and control of ORE. In early April, because a previous litigation involving the corporate structure of ORE had occurred in Connecticut in 1992, the Delaware action was stayed pending a possible determination of the parties' rights in Connecticut. The Delaware court felt that Connecticut was the best forum to litigate issues relating to this prior action. At the evidentiary hearing on this matter, this Court declined to make any decisions about ORE's current corporate struggles, leaving those issues to the Connecticut court.

[5] The November 1995 10Q form submitted to the Securities and Exchange Commission stated that at present, RMST has $2.1 million in liabilities and $160,000 in assets.

the moment. In fact, Mr. Tulloch's testimony, which was uncontradicted, indicated that these creditors may prefer to be official sponsors of RMST-run TITANIC events in lieu of being repaid.

Despite its debt load, RMST remains a financially viable entity. Although RMST appears to have little cash on hand, RMST presented evidence that it has a number of exhibition contracts signed or pending. A few companies have also signed contracts with RMST to obtain advertising rights. A contract for the production of a two-hour documentary is also pending. RMST, through its marketing partner, has been making money through the sale of videos and coal. *See* discussion *infra* part II.B. Finally and most significantly, RMST's marketing partner has organized two cruises to the wreck site in order to generate income to finance the 1996 salvage operations.[6] Ticket prices range from $1,800 to $6,950. As of the date of the hearing, 60% of the cabins had been booked on one ship and 10% had been booked on the other.[7] Michael R. Giorgio, the marketing company's chief financial officer, testified that RMST would net $2.4 million dollars from the cruises. He also testified that if the receipts for the cruise sales are insufficient to cover IFREMER's [8] charges, the marketing company would cover the costs. Furthermore, RMST has been attempting to pay some of its debts. IFREMER, one of RMST's major creditors, was recently paid the money owed it from the 1994 expedition.

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[6] IFREMER has agreed to supply vessels, equipment, and salvage personnel for the 1996 expedition provided that RMST pays it approximately $840,000.00 before the expedition.

[7] One reason for the difference in the cabin sales is that tickets for the Boston trip went on sale a few weeks before the tickets for the New York trip.

[8] IFREMER is the French government's oceanographic institute which has provided the salvage vessels, equipment, and technicians on past expeditions

The Court was not surprised that RMST was suffering some financial difficulties. This type of salvage operation is highly speculative and the expedition costs are high. Because RMST does not sell the artifacts it recovers, it is even more difficult to raise money to support its salvage and conservation activities.

B. RMST's Salvage-Related Activities

RMST and its predecessor in interest, Titanic Ventures, L.P., have conducted salvage operations at the wreck site of the TITANIC in 1987, 1993, and 1994. To date, over 3,600 artifacts have been recovered from the wreck. Two artifacts, one from the June 1993 expedition and one from the July 1994 expedition, remain within the geographic boundaries of the Eastern District of Virginia.

Since the 1994 expedition, RMST has not visited the site of the wreck. RMST has, however, been involved in a number of on-shore activities since that time. From October 1994 to October 1995, over 150 artifacts were exhibited at the National Maritime Museum of Great Britain located in Greenwich, England. This museum is the largest museum of its kind in the world. The exhibition was originally scheduled to be held for six months, but, because of the large turnout,[9] it was extended for another six months. Catalogs detailing the TITANIC wreck and salvage activities were produced and sold at the exhibition. There have also been several smaller exhibitions during the past few years, including one currently at the Science and Industry Center in Paris, France.

In addition, during 1994, an International Advisory Committee was established to address issues related to the future of both the wreck site and the retrieved artifacts. This committee consists of approximately twelve individuals,

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[9] During the TITANIC exhibition, over 720,000 people visited the museum, the largest attendance in its history.

including representatives of European and American maritime museums, TITANIC historical societies, and RMST. One of the committee's major tasks is to plan an international memorial museum which will house all the artifacts retrieved from the site.

Although RMST has promised not to sell any of the artifacts recovered from the site,[10] the company recently began selling the coal retrieved from the vessel to the public.[11] RMST, as well as other interested parties including the National Maritime Museum of Great Britain, do not consider the coal lumps to be "artifacts," as the coal is natural and not man-made. Because of the practical and monetary needs in funding expeditions to a historical site such as this, "natural" objects have been deemed expendable and saleable. Thus far, over $250,000 has been collected in coal sales.

Furthermore, since the last expedition, RMST has been committed to its role as "caretaker" of the retrieved artifacts. RMST has hired LP3 to actively conserve selected artifacts as well as to safely store and preserve the remainder until sufficient funding is available to actively work on those items.[12] Mr. Pennec, director of LP3, is a trained conservationist and is the supervisor of the recovered TITANIC artifacts. The evidence demonstrated that Mr.

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[10] As part of an agreement with the French government, RMST has promised not to sell artifacts. In addition, this position has been included as a part of the policy statement agreed to with the National Maritime Museum of Great Britain. Furthermore, RMST's promise to keep the artifacts together was one of the factors this Court considered when it granted salvor-in-possession status to RMST in 1994.

[11] The coal is sold in small pieces and comes in a display case with an accompanying plaque.

[12] At the present time, the complete conservation of the artifacts retrieved during the 1993 expedition is nearly finished, and the 1994 artifacts have been safely stored until funds become available.

Pennec is a highly skilled and reputable conservator, and that the salvaged artifacts are being properly conserved and carefully preserved by LP3.[13] Thus, RMST has kept its promise to maintain and preserve the TITANIC artifacts.

C. Future Plans

RMST has planned an expedition for August of 1996. In addition to its regular salvage operations, RMST, in conjunction with IFREMER, is planning to raise a small piece of the hull which is presently lying on the seabed, detached from the vessel.[14] The raising of this hull fragment coincides with the planned arrival of two cruise ships at the wreck location. Not only will these cruises generate income to finance the 1996 salvage expedition, they will also provide interested individuals a chance to visit the site and witness the salvage operations.[15] In addition, RMST is finalizing an agreement to permit the production of a two-hour documentary detailing this event, as well as the other salvage operations. This year's salvage operations will also utilize new technology to illuminate the site, which should

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[13] The Court makes this finding both from its own observations of Mr. Pennec and the testimony of Dr. Stephen Deuchar of the National Maritime Museum of Great Britain. While visiting LP3, he and Mr. Grayson, the museum's head conservator, were satisfied with the conservation activities of the lab.

[14] This section is approximately four meters wide and ten meters long. Pierre Henri Nargeolet, the expert technician who will be supervising the dives, estimated the fragment to weigh between eight and fifteen tons.

[15] The cruises have been arranged to be floating TITANIC conventions. Plans for the passengers include: lectures by TITANIC historians, TV screens broadcasting footage from the salvage operations, a re-creation of the CALIFORNIA incident, and, of course, an opportunity to witness a portion of the hull-raising.

give scientists and historians an increased visual understanding of the wreck site.

RMST is arranging an exhibition of the recovered hull fragment in Boston and New York upon the arrival of the two cruise ships to their home ports. The fragment will then be displayed at a New York exhibition along with retrieved artifacts from the 1996 expedition which do not require intensive conservation work. RMST is also in the process of organizing other expositions of TITANIC artifacts, including a traveling exhibition in Europe.

III. CONCLUSIONS OF LAW

A. Applicable Salvage Law

[1] The underlying purpose of salvage law is the complete salvaging of a distressed vessel. *See Columbus-America Discovery Group v. Atlantic Mut. Ins. Co.*, 974 F.2d 450, 460-61 (4th Cir.1992) ("the primary purpose of salvage law is the preservation of property"), *cert. denied*, 507 U.S. 1000, 113 S.Ct. 1625, 123 L.Ed.2d 183 (1993); *MDM Salvage, Inc. v. Unidentified, Wrecked and Abandoned Sailing Vessel*, 631 F.Supp. 308, 312 (S.D.Fla.1986) (salvage law is primarily concerned with the successful recovery of the vessel). As a consequence, courts sitting in admiralty have the authority to grant exclusive salvage rights and salvage awards to salvors who "have the intention and the capacity to save the property." *Columbus-America Discovery Group*, 974 F.2d at 460.

In this case, the Court has already granted salvor-in-possession status to RMST. *See* Order of June 7, 1994. The current issues before the Court are (1) whether RMST's status as salvor in possession should be rescinded and (2) what standard should be used to make such a determination. Many courts have indicated that a salvor can lose his exclusive possessory rights to the wreck if he fails to "exercise due diligence and be reasonably successful in his

attempts." *Cobb Coin Co. v. Unidentified, Wrecked and Abandoned Sailing Vessel,* 525 F.Supp. 186, 204 (S.D.Fla.1981); *accord Treasure Salvors, Inc. v. Unidentified Wrecked and Abandoned Sailing Vessel,* 640 F.2d 560, 567 (5th Cir.1981) (salvor has right to exclude others "so long as the original salvor appears ready, willing and able to complete the salvage project"); *Deep Sea Research v. BROTHER JONATHAN,* 883 F.Supp. 1343, 1361 (N.D.Cal.1995) (salvor "may lose his right to uninterrupted salvage operations if he does not assiduously undertake efforts to rescue the property"); *cf. Columbus-America Discovery Group,* 974 F.2d at 460 (salvor "must have the intention and the capacity to save the property involved"). At issue in the majority of these cases was the salvor's right to an injunction against rival salvors. Few cases have involved the rescission of salvor-in-possession status after the status has been granted. *See Martha's Vineyard Scuba Headquarters, Inc. v. Unidentified, Wrecked and Abandoned Steam Vessel,* 833 F.2d 1059 (1st Cir.1987) [hereinafter *MAVIS II*]; *cf. Brady v. S.S. AFRICAN QUEEN,* 179 F.Supp. 321 (E.D.Va.1960) (first finder of abandoned property loses salvage rights to second finder); *Eads v. Brazelton,* 22 Ark. 499 (1861) (same).

[2] In one such case involving the rescission of exclusive salvage rights, the First Circuit stated that a salvor must demonstrate that its efforts are "(1) undertaken with due diligence, (2) ongoing, and (3) clothed with some prospect for success" in order for it to maintain its rights. *MAVIS II,* 833 F.2d at 1061. Because the original salvor did not appeal the district court's finding that it had been dilatory, the circuit court did not apply the standard to the facts and circumstances of the case. *See id.* The test outlined in *MAVIS,* however, was based upon language from two other cases, *Hener v. United States,* 525 F.Supp. 350 (S.D.N.Y.1981), and *Cobb Coin.* Although neither of these

cases involved the rescission of salvor-in-possession rights,[16] both cases furnish additional guidance on the application of this standard.

[3] In *Hener,* the district court concluded that because salvage law is primarily concerned with "encourag[ing] open, lawful, and cooperative conduct, all in the cause of preserving property," it provides courts "more flexib[ility] in determining whether a salvor has commenced an operation worthy of protection." 525 F.Supp. at 358. Furthermore, because salvage rights are not necessarily permanent, "admiralty courts have more freedom to protect salvage operations that are *substantial and promising though not yet successful.* " *Id.* (emphasis added). The *Cobb Coin* court highlighted two types of exclusive salvage rights cases--those in which the courts have considered a wreck site to be abandoned where the first finder failed to take any real "possession" of it, thereby enabling a second finder to be awarded salvage rights, 525 F.Supp. at 204-05 (citing *AFRICAN QUEEN,* 179 F.Supp. 321, and *Eads,* 22 Ark. 499), and those courts which have refused to grant salvage rights to the second salvor because the original salvor's departure from the wreck site was "temporary," for a legitimate reason, and with the intention of returning within a reasonable time, *id.* at 205-06 (citing *Rickard v. Pringle,* 293 F.Supp. 981 (E.D.N.Y.1968)). *Hener* and *Cobb Coin* thus demonstrate both the flexible nature of salvor-in-possession rights and the equitable considerations that courts weigh when evaluating the appropriateness of awarding those rights. In addition, these cases illustrate the fact that a salvor in possession does not need to continuously guard the salvage site in order to maintain its rights.

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[16] The selection of a salvor in possession was at issue in *Hener.* 525 F.Supp. at 364-65. The *Cobb Coin* court discussed the differences between Florida's salvage law and federal admiralty law, including their effects on second salvors. 525 F.Supp. at 204-07.

[4] Cases granting exclusive salvage rights to one salvor and enjoining its rivals from interfering at the wreck site are also relevant to the present analysis. The standard those cases have employed is the same or is very similar to the standard described in *MAVIS II.* In fact, some recent decisions, in granting original salvor-in-possession rights, have quoted and relied, at least in part, upon the *MAVIS II* standard. *See, e.g., Bemis v. RMS LUSITANIA,* 884 F.Supp. 1042, 1051 (E.D.Va.1995) (a recent decision of this Court); *Moyer v. Wrecked & Abandoned Vessel, Known as the ANDREA DORIA,* 836 F.Supp. 1099, 1106 (D.N.J.1993). In *ANDREA DORIA,* after citing the *MAVIS II* standard, the district court expounded on its application and scope stating that, in order to receive exclusive salvage rights,

> possession need not be continuous, but only as such the 'nature and situation' of the salvage operations permit. At the same time, the possession must be notorious and give warning to actual or potential rival salvors of the ongoing salvage operations. Possession is not defeated, however, when the salvor leaves the wreck for a justifiable reason and with an intention of returning.

836 F.Supp. at 1106-07 (internal citations omitted); *accord BROTHER JONATHAN,* 883 F.Supp. at 1361; *see also LUSITANIA,* 884 F.Supp. at 1051. Hence, these cases also highlight the fact that, although a salvor in possession must demonstrate some degree of control over the wreck site, the "nature and situation" of the operations and the site itself will affect the requisite amount of control necessary to retain exclusive rights to the site.

Because of the similarity between the two standards,[17] the factors that have been used to determine

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[17] No court has, as yet, made any distinctions between the two standards.

whether to grant exclusive salvage rights are also pertinent here. Courts generally look at a number of factors in making this determination. In *Hener,* the court considered the time when each group began their labors, the duration of each groups' tangible salvaging activity, the comparative skill and quality of the competing groups, the salvors' investments in capital and labor, and the likelihood of success of each of the parties. *Hener,* 525 F.Supp. at 359. In addition, as recognized by the court in *MDM Salvage,* special consideration should be paid to the historical nature of the wreck. 631 F.Supp. at 310. There the court considered the salvors' independent, historical research about the wreck(s), the salvors' preservation of the archaeological integrity of the wreck site, the parties' on-site photography of the wreck site(s), and the salvors' marking of sites, as well as the parties' good faith salvage activities and their "sustained and significant commitment to salvage the purported wreck site." *Id.; see also ANDREA DORIA,* 836 F.Supp. at 1107 (relying extensively on the *MDM Salvage* factors, and considering plaintiff's "near-term ability to salvage the wreck," his historical research, his capital investments into the salvage operation, and his still and video photography of the site); *BROTHER JONATHAN,* 883 F.Supp. at 1363 (requiring the salvor in possession to describe its archaeological preservation activities when applying for an extension of time of its exclusive salvage rights); 2 THOMAS J. SCHOENBAUM, ADMIRALTY AND MARITIME LAW s 16-7, at 346 (2d ed. 1994) (submitting that the law of salvage, state and federal statutes, and international conventions "should be interpreted as requiring both a salvor and a finder of historic shipwreck to use proper archaeological techniques to preserve the scientific, historic, and archaeological integrity and provenance of the wreck"); *cf. Columbus-America Discovery Group,* 974 F.2d at 468 (emphasizing that "the degree to which salvors worked to protect the historical and archaeological value of the wreck and items salved" is an important consideration in granting a

salvage award). In sum, not only do courts consider the time, effort, and money that parties have invested in the salvage operation as well as their chances of success, but, where the vessel is of historic importance, they also weigh the salvor's archaeological preservation efforts.

Finally, although not of precedential value, the district court's findings and holding in *MAVIS* are also instructive. *Martha's Vineyard Scuba Headquarters, Inc. v. Unidentified, Wrecked and Abandoned Steam Vessel,* No. 82-3742-S (D.Mass. Apr. 16, 1986), *aff'd,* 833 F.2d 1059 (1st Cir.1987) [hereinafter *MAVIS I*]. The district court granted Martha's Vineyard Scuba Headquarters, Inc. (MVSHQ) exclusive salvage rights in 1983. *Id.* at 4. In that same year, MVSHQ completed the identification stage of its salvage plan and began its preliminary survey. *Id.* at 3. Nothing was done in 1984, and the preliminary survey was completed in 1985. *Id.* at 3-4. MVSHQ planned to begin its full scale survey in 1986. *Id.* Thus, MVSHQ had failed to salvage any item from the wreck, "accomplish[ing] little of note" while it had exclusive salvage rights. *MAVIS II,* 833 F.2d at 1061. On the other hand, the intervening salvor had completed a long survey of the wreck in 1985, had removed a few artifacts to identify the wreck, and was ready to go ahead with a thirty to forty day salvage dive in 1986, with the court's permission. *Id.* at 4-5. The district court held that MVSHQ, because it had been to the site only once during two diving seasons, had salvaged nothing from the wreck, and had no plans to salvage in 1986, had indeed been dilatory. Accordingly, the court allowed the second salvor to intervene and salvage the wreck, but, because of the time and energy MVSHQ had invested in the salvage operation, did not grant the second salvor exclusive rights. *Id.* at 8.

B. RMST Has Acted as a Salvor-in-Possession

Joslyn claims that RMST is no longer entitled to exclusive salvage rights. He asserts that RMST cannot demonstrate that its efforts have been undertaken with due diligence, are ongoing, and are clothed with some prospect for success. His arguments are based primarily on the failure of RMST to mount an expedition to the wreck site during the 1995 diving season and on RMST's present financial situation which, he asserts, will result in RMST's inability to conduct a 1996 expedition. Joslyn also downplays the archaeological preservation activities of RMST, suggesting that without concurrent expeditions to the wreck site, they are irrelevant. In determining whether RMST should remain sole salvor in possession, the Court will address each prong of the *MAVIS II* standard in turn.

1. Due diligence

The due diligence inquiry--whether RMST has shown a level of salvage activity that is reasonable under the circumstances--focuses primarily on the salvor's past operations. *ANDREA DORIA*, 836 F.Supp. at 1107. There is no set formula with which to measure the due diligence of a salvor. As Joslyn admits, "the relevant case law does not specifically set forth the quality of presence necessary or the frequency of salvage activity required for a salvor to retain its status as a salvor-in-possession." Intervenor's Memo. at 17. Using both the general principles and the relevant factors discussed in part III.A, *supra*, the Court finds that RMST has satisfied the due diligence prong of the test.

This case deals with one of the most famous shipwrecks in history, and thus, the archaeological preservation of the wreck itself as well as the recovered artifacts is of extreme importance to this Court. In addition, unlike a majority of the wrecked vessels which are easily accessible to divers, the TITANIC lies two-and-a-half miles

below the ocean surface and the use of a manned submersible is required to reach it. *See, e.g., MAVIS II,* 833 F.2d at 1061 (ship is located three hundred feet under the surface); *BROTHER JONATHAN,* 883 F.Supp. at 1364 (wreck is close to the shore); *MDM Salvage,* 631 F.Supp. at 312 (vessel in question is a "shallow water ocean wreck"); *Hener,* 525 F.Supp. at 351 (wreck located between New Jersey and Staten Island). Consequently, the cost of financing an expedition to the wreck site may be exorbitant and result in a slow recovery of artifacts.

[5] Contrary to Joslyn's assertions, the failure of RMST to dive in 1995 does not by itself indicate a lack of diligence on its part. Weather conditions in the North Atlantic Ocean permit expeditions only within a three month weather window. *See supra* part I. Thus, although Joslyn claims that RMST has failed to salve for eighteen months, in realistic terms, it has actually failed to salve for three months. In *MAVIS I,* the court found the salvor lacking in due diligence after it had failed to salvage the site for two successive diving seasons and had no plans to go down during the third. In the present case, the salvor has failed to salve for one diving season and is planning an expedition during the next weather window. As evidenced by the case law described in part III.A., *supra,* salvors may be temporarily absent from the wreck site; RMST's temporary absence from the wreck site, therefore, does not indicate a lack of dominion over the wreck.[18]

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[18] Joslyn's argument that the failure of RMST to leave a marker at the wreck site is further evidence that is has no control or dominion over the site is also unavailing. Although the *ANDREA DORIA* court may have considered this factor in its decision, 836 F.Supp. at 1103, the *Hener* court did not find this to be of great importance, 525 F.Supp. at 360. Here, where the salvors who are capable of reaching the TITANIC are aware that RMST has exclusive salvage rights, there is no need to leave a copy of the Court's order in a waterproof container at the wreck site. Furthermore, the wreck site is spread over a large area and leaving a copy of the Court's order would be both useless and impractical.

[6] In comparing RMST's activities with those of other reported salvage operations and considering the difficulties in financing and organizing the expeditions required at this particular wreck site, the Court concludes that RMST's salvage activities are reasonable in the circumstances. RMST and its predecessors have organized expeditions in 1987, 1993, and 1994, and have recovered approximately 3,600 artifacts. The sheer quantity of artifacts recovered appears to be much larger than that reported by other salvors. *See, e.g., MDM Salvage,* 631 F.Supp. at 313 (no artifacts of great significance were reported to be recovered); *Hener,* 525 F.Supp. 350 (no silver had apparently been salvaged). In addition, RMST has made significant capital investments in this venture and has hired extremely skilled divers to do the actual salvaging. *See Hener,* 525 F.Supp. at 364 (relying heavily on the parties' investments of time and money and the seriousness of the salvage operations). Moreover, RMST has been dedicated to the preservation of the archaeological integrity of the wreck site as well as the preservation of the retrieved artifacts. RMST has worked with a number of organizations to establish an International Advisory Committee whose purpose is to develop a strategy for safeguarding the TITANIC and the artifacts recovered from it. RMST has also hired a highly-qualified conservation company to preserve the artifacts. Finally, RMST has done more than merely preserve the site and the artifacts; it has made the artifacts available to the public through exhibitions, thereby benefiting the public more than the requisite at-site archaeological preservation could do. *See Columbus-America Discovery Group,* 974 F.2d at 450; *MDM Salvage,* 631 F.Supp. at 310. The Court also finds that, in a case such as this where the due diligence of a salvor in possession is at issue, the Court should compare both the salvor's representations as to its plans and the Court's expectations at the time the salvor was given exclusive rights with its actual accomplishments. In the original action, the Court used its

discretion to grant RMST salvor-in-possession rights because it believed that granting exclusive rights would lead to the actual salvaging of the TITANIC and the use of the recovered artifacts in the public interest and additionally, would prevent a destructive "free-for-all" looting of the historical vessel. Furthermore, RMST promised the Court that it would keep the artifacts together and preserve them for the public. RMST's promises to the Court in this respect have been fulfilled. RMST has been an guardian of the TITANIC artifacts: it has recovered thousands of artifacts from the wreck site, has hired a qualified conservator to actively conserve and preserve artifacts, and has organized exhibitions, including a one-year exhibition at the world's foremost maritime museum. RMST has demonstrated to this Court that it is continuing to organize future exhibitions of the artifacts. Hence, the Court finds that RMST has maintained the duties expected of it as salvor in possession of the TITANIC.

[7] Accordingly, from the preceding review of RMST's salvage operations, it is clear to this Court that RMST's efforts have been undertaken with due diligence.

2. Ongoing

[8] RMST must next establish that its salvage operations are ongoing. The evaluation of whether a salvor's operations are "ongoing" focuses not only on past operations, but also on present intentions. *ANDREA DORIA,* 836 F.Supp. at 1107; *LUSITANIA,* 884 F.Supp. at 1051. Upon an objective evaluation of the facts, it is clear that RMST's present intention is to continue to salvage the wreck site.

[9] [10] RMST has successfully recovered numerous artifacts in the past and has stated its intention to continue to do so. It has a charter agreement with IFREMER to dive in August of this year. In addition, at the time of the hearing, RMST's marketing partner stated that it had spent a large amount of time and money advertising the two cruises

to the site, and after a few weeks of sales, a significant amount of cabins had already been booked. As the case law discussed above has overwhelmingly emphasized, *see supra* part III.A, RMST's temporary absence from the wreck site in conjunction with its intention to return is not sufficient to support a finding that RMST has abandoned its salvage operations. *See* discussion *supra* part III.B.1 and cases described *supra* part III.A; *see also Hener*, 525 F.Supp. at 360 (salvor who temporarily left the wreck site with intention to return did not abandon its salvage operations; salvor needed to assemble the proper equipment himself because of its prohibitive cost). Finally, RMST's on-shore activities, especially the exhibitions and the continued payment for conservation and preservation of artifacts, also indicate that RMST is still committed to the salvaging of the TITANIC.[19] Thus, given these facts, RMST's efforts are sufficiently ongoing to merit the continuance of its status as salvor in possession.

3. Clothed with prospect of success

[11] Finally, RMST must also demonstrate that its efforts are clothed with a prospect of success. RMST and its predecessor in interest have made three successful expeditions to the TITANIC wreck site and have recovered over a thousand artifacts. Thus, "[t]hat these efforts have been 'clothed with success' can scarcely be denied." *ANDREA DORIA*, 836 F.Supp. at 1107. The only real question then is whether RMST has the financial capabilities to finance further salvage operations at the site. The

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[19] The Court does agree with Joslyn that if a salvor solely concerns itself with on-shore activities and shows no intention to continue salvaging the wreck site, the salvor should lose its exclusive salvage rights.

evidence at the hearing indicated that although at this time RMST's financial condition leaves much to be desired, it has a number of sponsors and backers to lead the ~~Court to~~ expect a successful 1996 dive season.[20] In addition, RMST has the necessary contracts in place to secure both divers and equipment for the 1996 expedition.

The Court again emphasizes the fact that this is a highly speculative business and, because the artifacts are being conserved and preserved for the public welfare rather than sold to the highest bidder, it is more difficult to raise the large sums of money necessary for the expeditions to the wreck site. RMST must depend on exhibition income as well as inventive marketing ideas, such as coal sales and cruises to the site, as a primary source of financing. Nevertheless, the Court finds that the testimony indicates a strong probability for a successful 1996 expedition, thus clothing RMST with a prospect of success.

Accordingly, upon the consideration and application of the foregoing legal principles to the facts and circumstances of the present case, the Court concludes that RMST should remain the sole salvor in possession of the TITANIC wreck site and **DENIES** Joslyn's motion requesting rescission of RMST's status.

IV. CONCLUSION

For the above reasons, the Court **DENIES** Joslyn's Motion requesting rescission of the Court's prior Order granting RMST salvor-in-possession status. The Court does, however, *sua sponte* modify its Order of June 7, 1994 to require RMST to make more frequent periodic reports.

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[20] The Court notes that a failure to complete a successful expedition during the forthcoming 1996 weather window may lead the Court to conclude that RMST's financial situation prevents it from being able to successfully salvage the site.

The Clerk is **REQUESTED** to forward a copy of this Order to the counsel of record for the parties.

It is so ORDERED.

Supreme Court, U.S.
FILED
JUL 21 1999
OFFICE OF THE CLERK

No. 98-2058

In The

Supreme Court of the United States

R.M.S. TITANIC, INCORPORATED,
successor in interest to Titanic
Ventures, limited partnership,

Petitioner,

v.

CHRISTOPHER S. HAVER;
DEEP OCEAN EXPEDITIONS, et al.,

Respondents.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit**

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. WHETHER THE FOURTH CIRCUIT PROPERLY FOUND THAT THE DISTRICT COURT LACKED AUTHORITY TO ENTER AN *IN PERSONAM* ORDER AGAINST NON-PARTIES OVER WHICH IT LACKED PERSONAL JURISDICTION.

2. WHETHER THE FOURTH CIRCUIT PROPERLY FOUND THAT TRADITIONAL SALVAGE RIGHTS DO NOT INCLUDE THE EXCLUSIVE RIGHT TO "EXPLOIT THE WRECK" BY INDEFINITELY PROHIBITING OTHERS FROM VISITING AND PHOTOGRAPHING THE *TITANIC*.

PARTIES TO THE PROCEEDING

The petition does not accurately list the parties to the proceeding.

Respondents Alfred S. McLaren, Ph.D., Don Walsh, Ph.D. and Ralph White were not "defendants" or "parties" in the proceedings before the district court. To the contrary, they were non-parties. Petitioner R.M.S. Titanic, Inc., the plaintiff/appellee below, never actually filed a complaint against respondents, nor did it serve them with any process. Petitioner's process consisted solely of filing a motion for preliminary injunction naming respondents and others as "defendants" in its *in rem* action against the wreck of the *R.M.S. Titanic*, to which respondents had never been made a party, and giving respondents informal notice of the motion's pendency by mailing them copies. Similarly, respondents were not "parties" in the appellate court. They did not participate in the appellate court proceedings, although the appellate court proceedings directly affected their individual rights. McLaren, Walsh and White are participating here as respondents because they have been named as such, and they have a personal interest in the outcome of the petition.

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STATEMENT OF THE CASE

The petition challenges the decision of the United States Court of Appeals for the Fourth Circuit that a United States District Court in Virginia may not issue an injunction in an *in rem* salvage proceeding against the wreck of the *R.M.S. Titanic*, which rests in international waters, prohibiting non-parties over which the court lacks *in personam* jurisdiction from visiting or photographing the wreck. The petition also challenges the Fourth Circuit's decision that traditional salvage rights do not include the exclusive right "to exploit the wreck" by controlling access and photography.

The Fourth Circuit's decision resolved a seven year legal battle over access to the *Titanic*. App. 7-12. Unlike the district court, in balancing the equities the appellate court properly considered *all* of the continuous multiple uses of the *Titanic*, including exploration, photography and scientific study, and the interests of those who would be adversely affected by the district court's ruling, including the respondents here. The appellate court's decision will pave the way for additional exploration of historic shipwrecks lost in the deep ocean because it eliminates the threat to explorers of being subjected to criminal sanctions in a foreign jurisdiction simply for looking at a sunken shipwreck in a public place. A reversal of this decision, however, will actually discourage exploration and salvage because it will provide an economic incentive for a salvor to "exploit the wreck" by prohibiting all access and photography, and to leave property on the bottom of the sea, in an effort to enhance the value of the salvor's new-found photographic rights.

As detailed below, there is no cause for this Court to review the Fourth Circuit's proper determination that the district court's authority to exercise *in rem* jurisdiction over property does not carry with it a concomitant, derivative power to enter ancillary *in personam* orders over individuals who are not parties to the proceedings and are not located within the court's territorial jurisdiction. App. 36-40. Similarly, there is no cause for this Court to review the Fourth Circuit's determination that the district court improperly expanded traditional salvage rights to include the exclusive right to photograph property that has yet to be saved. App. 40-44. As the appellate court found, this unprecedented expansion of traditional salvage rights is contrary to purpose of salvage law, which is to encourage the voluntary rescue of property lost at sea, because it provides an economic disincentive for the salvor to actually save the property at risk. App. 41-42.

A. The Petitioner And Respondents

Petitioner, R.M.S. Titanic, Inc. ("RMST"), is a Florida corporation with headquarters in New York, New York. RMST is the salvor in possession of the *R.M.S. Titanic*. App. 49. RMST and its predecessor in interest, Titanic Ventures, Limited Partnership ("TVLP"), have participated in five of the ten expeditions that have visited the *Titanic* since its discovery in 1985. The petitioner is the only entity to engage in salvage operations at the wreck site (in 1987, 1993, 1994, 1996 and 1998). The petitioner did not participate in the discovery of the *Titanic* or in any of the five scientific and photographic expeditions that have visited the wreck site (in 1985, 1986, 1991, 1995 and 1998).

Respondent Alfred S. McLaren, Ph.D., Capt., U.S.N. (Ret.), is a resident of New York, New York. Dr. McLaren is a graduate of the U.S. Naval Academy with a distinguished military career as a submarine officer. As a naval officer, Dr. McLaren made three Arctic expeditions, including the first submerged transit of the Northwest Passage and a North Pole expedition that included the first survey under ice of the entire Siberian Continental Shelf. Dr. McLaren has been awarded the Distinguished Service Medal, the nation's highest peacetime award, and two Legions of Merit. Dr. McLaren holds a doctorate degree in the physical geography of the polar regions from the University of Colorado. He is currently the President of The Explorers Club, an international multidisciplinary, professional society dedicated to the advancement of field research, resource conservation, and scientific exploration of land, sea, air and space.

Respondent Don Walsh, Ph.D., Capt. U.S.N. (Ret.), is a resident of Myrtle Point, Oregon. Dr. Walsh has been continuously involved in the design and operation of deep ocean submersibles for more than 40 years. He graduated from the U.S. Naval Academy in 1954 and served 14 years at sea, mostly in submarines. In 1959, Dr. Walsh was designated U.S. Navy deep submersible pilot No. 1. In 1960, Dr. Walsh and Jacques Piccard piloted the U.S. Navy's bathyscaph *Trieste*, a deep diving submersible, to a depth of 35,800 feet in the Marianas Trench, the deepest place in the world's oceans. This accomplishment, for which Dr. Walsh was awarded his first Legion of Merit, has never been repeated. Dr. Walsh holds a doctorate degree in physical oceanography from Texas

A&M University. He is currently President of International Maritime Incorporated, an Oregon-based marine consulting company.

Respondent Ralph White is a resident of Los Angeles, California. White is a distinguished cinematographer and underwater photographer, and the founder of White-Pix-Productions. He has participated as a cinematographer and submersible cameraman on four expeditions to the *Titanic*, including the expedition that discovered the *Titanic* in 1985, the first salvage expedition in 1987, and photographic expeditions in 1991 and 1995. He has made 23 submersible dives to the wreck. His photographs and films of the *Titanic* have been displayed throughout the world.

None of the respondents here participated in the proceedings in either the district court or the appellate court. They were never made parties to the case. Although the petitioner was able to locate the respondents and send them copies of its motion for preliminary injunction, it never properly initiated legal proceedings against them by filing a complaint; they were never served with process compelling their appearance at the preliminary injunction hearing; and, so far as the record shows, none of them has any contact with Virginia. Additionally, the respondents did not participate in the expedition that visited the wreck site after the district court issued its injunction on June 23, 1998.

B. Factual And Procedural History

The petition contains an incomplete recitation of the facts and procedural history which bear significantly on

the issues that would be before the Court if certiorari were granted. Accordingly, the following factual and procedural history corrects certain misstatements and omissions of fact in the petition.

When the *Titanic* set sail from Southampton, England on April 10, 1912, it was the largest man-made movable object in the world. Shortly before midnight on April 14, 1912, the "unsinkable ship" struck an iceberg approximately 400 miles southeast of Newfoundland, Canada, and sank in a little over two and a half hours. App. 4. Only 705 passengers and crew survived the sinking; more than 1500 people lost their lives.

The *Titanic* was discovered on September 1, 1985, by a team of scientists and photographers led by Dr. Robert Ballard of the Woods Hole Oceanographic Institution. Dr. Ballard's expedition discovered the *Titanic* using sonar and photographic equipment towed behind the U.S. Navy research vessel *Knorr*. The expedition confirmed that the *Titanic* split in half before sinking. The hull came to rest in two sections, separated by large debris field, at a depth of 12,500 feet. App. 84. The remains of the passengers and crew who lost their lives were eventually devoured by marine organisms. The only trace of human existence remaining today are shoes and other man-made items that litter the bottom. Among other things, the expedition produced an extensive photo mosaic and survey of the wreck site, which have been used by subsequent expeditions to plan their operations at the wreck site.

Dr. Ballard returned to the *Titanic* in 1986 to photograph the wreck using the deep diving submersible *Alvin*

and the remotely operated vehicle *Jason Junior*. The expedition conducted ten dives and took more than 57,000 photographs of the wreck site. Many of these photographs were eventually published in *National Geographic* magazine, and Dr. Ballard's expedition was the subject of a National Geographic Society documentary.

Dr. Ballard never permanently recovered any artifacts from the *Titanic*, and he never asserted a claim to the wreck in court. Instead, he worked to promote an international agreement to protect the *Titanic* from commercial salvage and to obtain passage of the R.M.S. Titanic Maritime Memorial Act of 1986 ("the Act"), 16 U.S.C. § 450rr, *et seq*. The Act expresses the sense of Congress that "limited exploration activities concerning the R.M.S. Titanic should continue for the purpose of enhancing public knowledge of its scientific, cultural, and historical significance." 16 U.S.C. § 450rr-5. The Act also proscribes the assertion of jurisdiction by the United States over the *Titanic* wreck site because it is located in international waters. 16 U.S.C. § 450rr-6.

Three observers from The Institute of France for the Research and Exploration of the Sea ("IFREMER") were on board the *Knorr* when the *Titanic* was discovered in 1985. IFREMER did not share Dr. Ballard's sentiment that the *Titanic* should not be salvaged. In August 1987, IFREMER and TVLP salvaged the first artifacts from the *Titanic* using the submersible *Nautile*. The 1987 expedition conducted 32 dives to the wreck and recovered 1800 artifacts. App. 50. Among other things, the expedition recovered a black leather bag containing $62,000 in currency, 300 gold coins, and several items of precious jewelry. Significantly, although the petitioner claims that it has

pledged not to sell artifacts from the *Titanic*, its charter agreements with IFREMER specifically exclude gold, jewelry and currency from the definition of "artifacts." Its charter agreements also permit the sale of artifacts as a "collection" to "any entity that will make them available for exhibition to the public."

In June 1991, a joint Canadian-Russian-American expedition led by respondent Ralph White used the Russian research vessel *Akademik Mstislav Keldysh* and its *Mir I* and *Mir II* submersibles to study the *Titanic*'s marine environment and film the IMAX documentary *"Titanica."* The expedition recovered steel samples from the debris field for metallurgical testing, which subsequently revealed that the steel used to make *Titanic* was more brittle than that used today and a loss of its ductility in the cold North Atlantic waters most likely contributed to the damage that led to the ship's sinking. The expedition also shot 40,000 feet of 70 mm IMAX film, documented 28 species of animals and fish, and collected hundreds of samples of fish, rock, bacteria, specialized coral, and core samples from the deep ocean floor.

Although the 1991 expedition did not recover any artifacts, it represented a threat to the salvor's ability to obtain exclusive salvage rights because it demonstrated that the salvor had not conducted salvage operations in more than four years and, therefore, it was not undertaking salvage efforts with due diligence.

Indeed, in 1992 a would-be salvor, Marex Titanic, Inc. ("Marex"), filed a complaint in the U.S. District Court for the Eastern District of Virginia, Norfolk Division, seeking the exclusive right to salvage artifacts from the *Titanic*.

On August 12, 1992, the court asserted jurisdiction over the *Titanic*, issued a warrant to arrest the shipwreck, and ordered the U.S. Marshal to take possession of any artifacts recovered from the *Titanic* until the court made a determination of ownership. *Marex Titanic, Inc. v. The Wrecked and Abandoned Vessel*, 805 F. Supp. 375 (E.D. Va. 1992), *rev'd*, 2 F.3d 544 (4th Cir. 1993). Marex, however, had never performed any salvage operations at the *Titanic* site. As soon as TVLP learned of Marex's action, it intervened to assert a superior salvage claim and prohibit Marex from engaging in salvage operations. *Id.* at 376. After a hearing to determine which party had exclusive salvage rights, the district court sided with TVLP and entered an order vacating the August 12, 1992 order. *Id.* at 377. The court's order, however, was later reversed by the Fourth Circuit on technical grounds, *Marex*, 2 F.3d at 545-48, which left the question of salvage rights unresolved.

On August 26, 1993, RMST finally filed a complaint in Norfolk asking the district court to declare it to be the sole and exclusive owner of any items salvaged from the *Titanic*. App. 88-89. Relying on the presence of a single wine decanter recovered from the *Titanic* in the courtroom, the district court asserted "constructive *in rem*" jurisdiction over the *Titanic* and the wreck site. App. 46. The court ordered the U.S. Marshal to arrest the *Titanic* and the artifacts already recovered pursuant to Supplemental Admiralty Rule C(2), and RMST was appointed substitute custodian of the wreck, wreck site and artifacts recovered, in lieu of the U.S. Marshal. *Id.*

IFREMER and RMST conducted additional salvage expeditions in 1993 and 1994. App. 50, 93-95. In 1993, the

salvors recovered 800 artifacts during the course of 15 dives to the wreck. App. 50. In 1994, the salvors recovered over 1000 artifacts from the wreck site. The artifacts were transported to France for restoration and conservation. *Id.* However, two artifacts, one from each expedition, were kept in the Eastern District of Virginia to serve as "jurisdictional anchors." App. 93.

On June 7, 1994, the district court entered an order awarding RMST salvor in possession status over the *Titanic*. App. 47. Even though salvage activities were ongoing, the district court declared that RMST "is the true, sole and exclusive owner of any items salvaged from the wreck in the past, and so long as [RMST] remains salvor in possession, items salvaged in the future, and is entitled to all salvage rights . . . " *Id.* The district court further ordered that "default judgment is entered against all potential claimants who have not yet filed claims [to the *Titanic* or its artifacts] and such claims are therefore barred and precluded so long as [RMST] remains salvor in possession." *Id.*

In 1995, RMST learned that director James Cameron intended to used the *Keldysh* and *Mir* submersibles to conduct location filming of the wreck for his movie "*Titanic*." RMST immediately threatened Cameron that it would pursue litigation against him on the grounds that filming the wreck would violate RMST's rights as salvor in possession. Cameron filmed the *Titanic* anyway, without seeking permission or a license. RMST never fulfilled its threat to pursue litigation. In a Periodic Report of Salvor in Possession on the Progress of Recovery Operations dated September 20, 1996, RMST explained to the district court that "it determined not to seek injunctive

relief" because Cameron only intended to photograph the wreck and not to recover artifacts, and these activities would not interfere with RMST's rights as salvor in possession.

In 1996, respondent John A. Joslyn unsuccessfully challenged RMST's salvor in possession status. App. 88-108. RMST sought injunctive relief when Joslyn subsequently expressed an intention to visit the *Titanic* solely to photograph it. App. 48. On August 9, 1996, the district court issued an injunction prohibiting Joslyn from photographing the wreck. *Id*. Additionally, on August 13, 1996, the district court entered an amended order expanding RMST's rights as salvor in possession to include the exclusive right to control access to the *Titanic* "for any purpose," and to control photography of the wreck and wreck site. App. 48-49, 82-86. The court explained that it made this unprecedented expansion of traditional salvage rights because RMST was unable to recoup its salvage expenses through the sale of artifacts and, therefore, it was entitled to the exclusive right to market images of the *Titanic* as a means of making a profit.[1] App. 84-85, 94 n. 10 ("As part of an agreement with the French government, RMST has promised not to sell artifacts."). Joslyn appealed the August 13, 1996 injunction to the Fourth

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[1] The court was apparently unaware of a provision in RMST's charter agreements with IFREMER which permits the sale of *Titanic* artifacts as a "collection" to "any entity that will make them available for exhibition to the public." The court also failed to recognize that the charter agreements exclude gold, jewelry and currency from the definition of "artifacts," and that RMST had already pledged the contents of the black bag recovered in 1987 as collateral for various loans.

Circuit, but the appeal was dismissed before a hearing on the merits pursuant to a stipulation filed by the parties. App. 49.

In August 1996, RMST returned to the *Titanic* with a large contingent of support vessels, including a cruise ship filled with celebrities and passengers who paid fares as high as $6,950 to watch the expedition's recovery efforts. App. 92. The primary purpose of the 1996 expedition was to raise a large section of the hull dubbed the "Big Piece." App. 95. This effort was unsuccessful. In fact, RMST recovered just 74 objects during the 1996 expedition. App. 50.

In 1998, RMST planned to return to the wreck to recover the "Big Piece," and to produce the first live television broadcast from the wreck itself. App. 57-58. The P.P. Shirshov Institute of Oceanology of the Russian Academy of Sciences, which owns the *Keldysh* and *Mir* submersibles, also planned to return to the *Titanic* in 1998 to conduct additional scientific experiments. App. 52-54. The scientific expedition was to be financed by respondent Deep Ocean Expeditions ("DOE"), which proposed to charge an international group of passengers $32,500 each to dive to the wreck and participate in the scientific research. *Id.* Each dive on the expedition, which was promoted as "Operation Titanic," would be filmed, and passengers would receive videotapes of their dives to keep as mementos. *Id.* DOE and the Shirshov Institute pledged not to recover any artifacts or disturb the *Titanic*. App. 54.

When RMST learned of Operation Titanic, it was engaged in negotiations with NBC and The Discovery Channel to license the exclusive television broadcast rights to its 1998 expedition for $6 million. App. 73. RMST immediately filed a motion for preliminary injunction in its *in rem* action against the *Titanic*. App. 9, 45, 54-55. RMST's motion requested that any person or entity mentioned in Operation Titanic's promotional material, including respondents Alfred McLaren, Don Walsh and Ralph White, be prohibited from visiting or photographing the *Titanic*. App. 45, 54-55. RMST mailed its motion to some of Operation Titanic's participants, including respondents McLaren, Walsh and White. App. 56. It did not, however, initiate legal proceedings against them by filing a complaint. App. 16. They were never served with process, and the court lacked *in personam* jurisdiction over them. App. 16, 18.

The district court held a hearing on RMST's motion on May 27, 1998. App. 56. The respondents did not appear at the hearing because they were not parties to the case and they were not served with any process. App. 10. The district court, however, adjudicated the respondents' rights in their absence.

On June 23, 1998, the district court issued a preliminary injunction prohibiting all of the individuals and entities identified in RMST's motion, including respondents McLaren, Walsh and White, from visiting the *Titanic* for any reason. App. 45-81. The injunction prohibited the respondents and "all the world" from entering a 168 square mile area of the high seas encompassing the *Titanic* for an indefinite period of time. App. 79-80. The

district court reaffirmed its decision that RMST was entitled to the exclusive right to control access and photography because it had agreed not to sell artifacts and, therefore, it was entitled to alternative means of making a profit. App. 78. The district court did not acknowledge any of the prior scientific or photographic expeditions that had visited the wreck site. The district court also did not consider the competing interests of the scientific community or the multiple documentaries and films that have already featured the *Titanic*. Instead, the district court gratuitously criticized the non-parties for failing to appear at the preliminary injunction hearing, App. 73-74; it referred to the non-parties as "thrill-seekers," "adventure tourists" and "souvenir hunting photographers," App. 74, 76 and 79; and it belittled the harm they would suffer if they were prohibited from visiting the *Titanic*, referring to it as "nostalgic," "minimal," "sentimental" and "speculative." App. 73-74. Indeed, the district court seemed annoyed that it was even forced to consider the non-parties' rights at all, stating: "Even comparing RMST's harm with the quixotic harm of a band of adventure tourists borders on irrational." App. 74. In one particularly memorable finding, the district court rationalized that the respondents would not suffer any harm because they could each save $32,500 by staying home to watch the *Titanic* on television. *Id.*

In August 1998, RMST returned to the *Titanic* and succeeded in raising the "Big Piece." It also presented the first live television broadcast from the *Titanic* wreck. A few days after RMST left the wreck site, the *Keldysh* arrived with a team of scientists and a dozen passengers. On September 9, 1998, the first expedition members dived

to the *Titanic*. A week later, RMST filed a notice requesting that the district court hold the expedition participants in criminal contempt of court for violating its injunction.

On March 24, 1999, the Fourth Circuit issued its decision affirming the district court's order in part, reversing it in part, and remanding with instructions to the district court to modify its order in accordance within the appellate court's opinion. App. 1-44. The Fourth Circuit rejected RMST's argument that an injunction is valid against a non-party who merely received a copy of a motion for preliminary injunction in the mail, as opposed to an actual party who is named in a complaint, served with process and enjoined after an opportunity to appear and be heard. App. 18-20. Therefore, the appellate court reversed the injunction because the district court lacked personal jurisdiction over the non-parties. *Id.*

The appellate court also rejected RMST's argument that it deserved the exclusive right to control access and photography as a "bonus" for agreeing not to sell artifacts. App. 40-43. The appellate court found that no precedent existed to support such a merger of intellectual property rights and traditional salvage rights. *Id.* Indeed, the appellate court found that awarding exclusive photographic rights to a salvor was contrary to the purpose of salvage law, which is to recover property lost at sea, because it would encourage salvors to leave ships in place so they can collect revenue by licensing access and photographic rights. *Id.*

The appellate court, however, affirmed RMST's right to recover artifacts without direct interference from others while it is on site. App. 40. The appellate court also

decided that a United States district court can properly assert jurisdiction over a shipwreck located in international waters, finding that the precedent for such an assertion exists in the 3000 year history of international maritime law. App. 36-40.

Finally, on April 21, 1999, RMST publicly announced that it had licensed the exclusive worldwide rights to exhibit the artifacts recovered from the *Titanic* to SFX Entertainment, Inc., one of the largest promoters and owners of live entertainment venues in the United States, for a guaranteed minimum payment to RMST of $8.5 million annually. The licensing agreement has an initial term of one year, beginning September 14, 1999. SFX has the option to extend the term of the licensing agreement for up to four additional one year periods. This licensing agreement has provided a significant boost to RMST's revenues, which should permit the company to continue preserving and displaying artifacts in the absence of exclusive photographic rights.

REASONS FOR DENYING THE PETITION

RMST asserts two reasons for granting its petition: (1) the appellate court allegedly "significantly constricted the jurisdiction of federal courts to address admiralty matters," thereby "forcing RMST to pursue, in forums all over the world, those who jeopardize its rights as salvor-in-possession[;]" and (2) the appellate court's ruling "will encourage lawlessness and anarchy on the high seas" and "creates the risk that the salvage of historic shipwrecks will be conducted in an irresponsible manner." Pet. at 8-9.

The petition ignores the Fourth Circuit's proper application of established legal principles. Moreover, RMST's hyperbole has no basis in fact.

A. The Fourth Circuit Properly Found That The District Court Erred In Adjudicating The Respondents' Rights In The Absence Of *In Personam* Jurisdiction

The respondents were not parties to the action in the district court. RMST never properly initiated legal proceedings against them by filing a complaint; they were never served with process compelling their appearance at the preliminary injunction hearing; and, so far as the record shows, none of them had any contact with Virginia.

Even though the petitioner complains that it will be forced "to pursue" the respondents "in forums all over the world," the Fourth Circuit placed a burden on RMST that is no greater than that faced by any other litigant. Moreover, it would not have been difficult for RMST to initiate civil proceedings against respondents McLaren, Walsh and White where they reside in the United States. In fact, RMST maintains its headquarters in New York City, where respondent Alfred McLaren resides. RMST could have easily initiated civil proceedings against the respondents by filing a complaint against them in accordance with Rule 3 of the Federal Rules of Civil Procedure, and by serving them with process in accordance with Rule 4. Instead, RMST chose to engage in procedural shenanigans by filing a motion for preliminary injunction naming the respondents as defendants in RMST's *in rem*

action against the shipwreck, and then improperly informing the respondents that, in essence, they could pay tens of thousands of dollars to retain legal counsel, travel hundreds or thousands of miles to defend themselves, and waive all jurisdictional and procedural defects by appearing in Virginia and participating in RMST's legal charade.

Despite these fatal procedural defects, the district court violated the respondents' right to due process by adjudicating their individual rights in the absence of *in personam* jurisdiction. Moreover, the district court criticized the respondents for failing to appear at a preliminary injunction hearing, and it denigrated the harm they would suffer if they were prohibited from exploring the *Titanic*.

The Fourth Circuit correctly applied well-established legal principles in finding that the district court committed error by failing to ensure that the respondents were actually made parties to the case, that they were properly served with process, and that the district court otherwise could constitutionally exercise personal jurisdiction over them. App. 16-20. In resolving the jurisdictional dispute, the Fourth Circuit emphasized the distinction between *in personam* jurisdiction and *in rem* jurisdiction:

> "[a]ctions *in rem* are prosecuted to enforce a right to *things*," whereas "actions *in personam* are those in which an *individual* is charged personally." *The Sabine*, 101 U.S. 384, 388 (1879) (emphasis added). Because *in rem* actions adjudicate rights in specific property before the court, judgments in them operate against anyone in the world claiming against *that* property.

> *See The Moses Taylor*, 71 U.S. (4 Wall.) 411, 427 (1866) (describing *in rem* jurisdiction and stating that "[i]t is this dominion of the suit in admiralty over the vessel or thing itself which gives to the title made under its decrees validity against all the world"); *see also Darlak v. Columbus-America Discovery Group, Inc.*, 59 F.3d 20 (4th Cir. 1995). Consequently, judgments in *in rem* actions affect only the property before the court and carry no *in personam* significance, other than to foreclose any person from later seeking rights in the property subject to the *in rem* action. *See Pennoyer*, 95 U.S. at 724. The court's authority to exercise *in rem* jurisdiction does not carry with it a concomitant, derivative power to enter ancillary *in personam* orders. *See The Sabine*, 101 U.S. at 388.

App. 16-17.

Accordingly, the Fourth Circuit found that: "[i]njunctive relief, by its very nature, can only be granted in an *in personam* action commenced by one party against another in accordance with established process. Consequently, a party cannot obtain injunctive relief against another without first obtaining *in personam* jurisdiction over that person or someone in legal privity with that person." App. 17. *See also Treasure Salvors, Inc. v. Unidentified, Wrecked and Abandoned Sailing Vessel*, 640 F.2d 560, 570-71 (5th Cir. 1981) (court cannot adjudicate competing claims to shipwreck over which it has *in rem* jurisdiction without first perfecting *in personam* jurisdiction over the parties).

The cases cited by the petitioner do not overcome the Fourth Circuit's recognition that *in personam* jurisdiction

and *in rem* jurisdiction are both "grounded on the principle that 'every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory[.]' " App. 16 (citing *Pennoyer v. Neff*, 95 U.S. 714, 722 (1877)). In *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979), both the property, fish passing through recognized tribal fishing grounds in a defined area of Washington, and the non-parties, non-Indian citizens of Washington, were located within the court's territorial jurisdiction. *Washington*, 443 U.S. at 669-71. Similarly, in *United States v. Hall*, 472 F.2d 261 (5th Cir. 1972), the property, a Florida school, and the non-party, a racist agitator, were located within the court's territorial jurisdiction. *Hall*, 472 F.2d at 263-64. Finally, in *Zych v. S.B. Lady Elgin*, 1991 WL 34714, 1991 U.S. Dist. LEXIS 2962 (N.D. Ill. 1991), *vacated on other grounds*, 960 F.2d 665 (7th Cir.), *cert. denied*, 506 U.S. 985 (1992), both the property, a shipwreck located in Lake Michigan, and the alleged violators of the court's injunction were located in Illinois. *Zych*, 1991 WL 34714, *5. This case is different because neither the shipwreck nor the respondents are located within the district court's territorial jurisdiction.

Additionally, the All Writs Act, 28 U.S.C. § 1651, does not enlarge the district court's territorial jurisdiction. It simply provides that: "[t]he Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate *in aid of their respective jurisdictions* and agreeable to the usages and principles of law." 28 U.S.C. § 1651 (emphasis added). Moreover, the All Writs

Act does not permit the district court to violate an individual's right to due process, particularly where the court lacks *in personam* jurisdiction over the individual.

It is well-settled that due process precludes courts from adjudicating *in personam* the rights or obligations of a person where the individual is not a party and in the absence of personal jurisdiction. *See Omni Capital Int'l, Ltd. v. Rudolph Wolff & Co. Ltd.*, 484 U.S. 97, 104 (1987) ("Before a federal court may exercise personal jurisdiction over a defendant, the procedural requirement of service of summons must be satisfied."); *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 110 (1969) ("It is elementary that one is not bound by a judgment *in personam* resulting from litigation in which he is not designated as a party or to which he has not been made a party by service of process."). To obtain personal jurisdiction over a defendant, a court must have: (1) proof of "notice to the defendant;" (2) "a constitutionally sufficient relationship between the defendant and the forum;" and (3) either "a basis for the defendant's amenability to service of summons" or, absent consent, "authorization for service of a summons on the defendant." *Omni Capital*, 484 U.S. at 104.

None of these requirements were satisfied by the petitioner. RMST could have properly initiated civil proceedings against respondents McLaren, Walsh and White in the districts where they reside. It simply decided not to do so. Accordingly, the Court should not waste its valuable time reviewing a case where the petitioner does not even care to follow the rules of civil procedure.

B. The Petition Significantly Misstates The Likelihood Of Conflict If Non-Salvors Are Permitted To Visit The *Titanic*.

The petitioner argues that this Court should reverse the decision of the Fourth Circuit because it "will encourage lawlessness and anarchy on the high seas" and it "creates the risk that the salvage of historic shipwrecks will be conducted in an irresponsible manner." Pet. at 8-9. Nothing could be further from the truth.

The petitioner significantly misrepresents the potential for conflict on the high seas if the appellate court's decision is not reversed. In the 14 years since its discovery, and after ten expeditions to the wreck site, the only competition over access to the *Titanic* has occurred in the courtroom. There has never been a confrontation on the high seas, and it is extremely unlikely that one will ever occur.

Because the *Titanic* sits at such an extreme depth, where the water pressure is in excess of 6000 pounds per square inch, it is impossible to reach the wreck without using extraordinarily sophisticated and expensive underwater equipment. Salvage must be conducted by use of a manned submersible. Currently, there are only five submersibles in the world that can operate at the depth of the *Titanic*: *Alvin*, *Nautile*, *Mir I*, *Mir II* and *Shinkai 6500*. All of these submersibles, with the exception of the Japanese *Shinkai 6500*, have already visited the wreck site. Only the *Nautile*, which is owned by the French government, has participated in salvage operations. The *Alvin*,

which is owned by the U.S. Navy, and the *Mir* submersibles, which are owned by the Russian Academy of Sciences, have limited their activities at the wreck site solely to conducting exploration, photography and scientific experiments. They have never recovered any artifacts from the wreck site. Contrary to the petitioner's dire prediction that "lawlessness and anarchy" are about to reign on the high seas, nothing but harmony has occurred at the *Titanic* wreck site since the wreck was discovered 14 years ago.

The petitioner also misrepresents the potential for salvage being conducted in an irresponsible manner if the Fourth Circuit's decision is not reversed. The Fourth Circuit's decision will not lead to a free-for-all of inappropriate salvage. Indeed, the district court found that RMST was engaging in responsible salvage operations when it appointed RMST salvor in possession in 1994, long before it awarded RMST exclusive access and photographic rights. App. 96-107. As in all modern shipwreck salvage cases, the district court was required to consider whether the salvor was maintaining the archaeological and historical value of the wreck and items salved in determining whether the salvor was entitled to salvor in possession status. *See Columbus-America Discovery Group v. Atlantic Mut. Ins. Co.*, 974 F.2d 450, 468 (4th Cir. 1992) (*"CADG"*), *cert. denied*, 507 U.S. 1000 (1993); *Deep Sea Research, Inc. v. The Brother Jonathan*, 883 F. Supp. 1343, 1362 (N.D. Cal. 1995), *aff'd*, 102 F.3d 379 (9th Cir. 1997), *aff'd in part, vacated in part and remanded*, 118 S. Ct. 144 (1998); *MDM Salvage v. Unidentified, Wrecked and Abandoned Sailing Vessel*, 631 F. Supp. 308, 310 (S.D. Fla. 1986). The Fourth Circuit's decision does not change this requirement.

The Court should not be misled by the petitioner's unfounded suggestion that lawlessness and anarchy will reign on the high seas if the Fourth Circuit's decision is not overturned. Similarly, the Fourth Circuit's decision will not cause a deterioration in the principles adhered to by professional salvors because their ability to obtain and maintain exclusive salvage rights depends on their faithful adherence to maintaining the archaeological and historic integrity of the wreck site.

C. The Fourth Circuit Properly Found That Awarding Exclusive Access And Photographic Rights Is Contrary To The Purpose Of Salvage Law

The purpose of the law of salvage is to encourage persons to render prompt, voluntary, and effective service to ships at peril or in distress by assuring them compensation and reward for their salvage efforts. *The Akaba*, 54 F. 197, 200 (4th Cir. 1893). *See also The Sabine*, 101 U.S. 384 (1880); *CADG*, 974 F.2d at 460-61 ("the primary purpose of salvage law is the preservation of property"); *MDM Salvage*, 631 F. Supp. at 312 (salvage law is primarily concerned with the successful recovery of the vessel). Under the law of salvage, a person who returns a shipwreck to its rightful owner, or the property lost to the "stream of commerce," is entitled to a liberal reward for their services, which is normally derived from the sale of the property recovered. *CADG*, 974 F.2d at 459-61. However, because the salvor is voluntarily rendering assistance, he assumes the risk that he may not be fully compensated for his services. There is no legal guarantee that a salvor will always realize a profit from his activities.

The Fourth Circuit recognized that awarding exclusive photographic rights to a salvor was contrary to the purpose of salvage law because it would encourage salvors to leave property in place so they can collect revenue by licensing photographic rights and charging the public for the opportunity to view the wreck.[2] App. 42. This is exactly what RMST has done with the *Titanic*. Since RMST was awarded the exclusive right "to exploit the wreck" in August 1996, the number of artifacts it has recovered has dropped dramatically. In 1987, 1993 and 1994, RMST recovered a total of 3600 artifacts. App. 50-51. In 1996, however, RMST recovered just 74 artifacts. App. 50. And, while nearly all of RMST's expedition costs in 1998 were paid directly by the Discovery Channel in exchange for exclusive photographic rights, App. 57-59, 73, the 1998 expedition recovered fewer than 100 artifacts.

Moreover, there is no evidence that RMST has not made a profit from the display of artifacts. In fact, attendance at RMST's museum exhibitions increased due to heightened public interest caused by the movie "*Titanic*," App. 58-59, which was filmed without RMST's authorization. In addition, just one month after RMST lost its exclusive rights of access and photography, it successfully completed a lucrative licensing agreement with SFX Entertainment for the display of artifacts. Therefore,

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[2] As an alternative basis for reversing the district court's award of exclusive access and photographic rights, the Fourth Circuit found that ordinary property rights and intellectual property rights do not include the right to exclude viewing and photographing property when it is located in, or visible from, a public place. App. 42 n.5 (citing 17 U.S.C. § 120(a)). This ruling is also correct.

RMST's implied threat that it may be forced to sell the *Titanic* artifacts if the Court denies review is without merit.

The Fourth Circuit properly found that the district court's extension of salvage law to include the exclusive rights to visit, view and photograph the *Titanic* at its location in international waters was both unwarranted and unprecedented. There is no compelling basis for the Court to reverse this decision.

D. The Public Interest Is Best Served By Maintaining Public And Scientific Access To The *Titanic* And Other Historic Shipwrecks

The petitioner argues that it is in the public interest to deny public and scientific access to the *Titanic* because the petitioner is returning artifacts "to society for the general use and education of all mankind." Pet. at 13 (citing App. 78). This myopic argument ignores the substantial benefit the public has already received from scientific exploration of the *Titanic*, and the public interest in maintaining access to the *Titanic* and other historic shipwrecks for exploration and scientific study.

Congress has unequivocally expressed the sentiment of the American public that "limited exploration activities concerning the R.M.S. *Titanic* should continue for the purpose of enhancing public knowledge of its scientific, cultural, and historical significance." 16 U.S.C. § 450rr-5. Furthermore, Congress has explicitly recognized that science flows from exploration, and that scientific exploration is worthy of national acclaim and encouragement. It has declared a national policy "to develop, encourage,

and maintain a coordinated, comprehensive, and long-range national program in marine science for the benefit of mankind." 33 U.S.C. § 11019(a). The objectives of that policy include "encouragement of private investment enterprise in exploration, technological development, . . . and economic utilization of the resources of marine environment," and cooperation "with other nations . . . in marine science activities." 33 U.S.C. § 11019(b)(2), (3) and (8).

The public has already benefitted immeasurably from scientific exploration of the *Titanic*. Dr. Ballard's 1985 and 1986 expeditions contributed significantly to the fields of underwater sonar mapping, deep-sea visual imaging technology and underwater photography, as well as the development of Woods Hole Oceanographic Institution's Deep Submergence Lab. The 1991 expedition, conducted by respondent Ralph White and many of the other non-parties enjoined by the district court, was the most important scientific expedition to the *Titanic* to date. In addition to filming a feature length documentary in enlarged 70 mm format, the expedition collected hundreds of samples of fish, rock, bacteria and specialized coral, core samples from the deep ocean floor, and steel samples for metallurgical testing. It also studied the biology, sediment transport and organic corrosion rates of the deep ocean. The 1995 expedition led to advances in film-making technology and underwater lighting systems.

Additionally, 28 species of animals and fish inhabiting the deep ocean have been discovered during scientific expeditions to the *Titanic*. In fact, prior to the discovery of the *Titanic*, it was thought that very little sea life existed

in the deep ocean around the *Titanic*, where the water temperature is near freezing, there is no natural light, and the water pressure exceeds 6000 pounds per square inch. As a direct result of the scientific exploration of the *Titanic*, this theory has been disproved.

Limiting access to the *Titanic* to infrequent salvage expeditions conducted by one company would actually harm the public interest. From 1987 through 1998, there were a total of 1320 days during which RMST could have conducted on-site operations. RMST has conducted on-site operations on only about 180, or 14 percent, of the available days. Most of those days have been spent salvaging artifacts rather than performing scientific research. Moreover, in 1998, many of the expedition's days were spent either filming or preparing to film the Discovery Channel live broadcast. Consequently, RMST has not, and can not, perform all the scientific research the *Titanic* deserves. Moreover, RMST makes no guarantee that it will ever return to the wreck site.

The district court's decision that RMST's salvor in possession status included the exclusive right to indefinitely prohibit all public and scientific access to the *Titanic* for any purpose, including scientific study, exploration and photography, was detrimental to the respondents, scientists and the public at large. The district court's decision subjected the respondents to the threat of legal action in foreign jurisdictions, despite the lack of any proper initiation of legal proceedings against them, the lack of service of process, the absence of any contacts with the forum, and the fundamental unfairness of being

hauled into court for engaging in exploration and scientific study.

The appellate court's decision, however, determined that historic shipwrecks deteriorating on the ocean floor should be readily accessible to those who are willing and able to surmount the innumerable obstacles to explore and study them without fear of facing retribution or sanctions, and without being labeled trespassers, "thrill-seekers" or "adventure tourists." The appellate court's decision will have a profound effect on underwater scientific exploration because it confirms that exploration does not conflict with salvage operations, particularly where the explorers have openly promised that they will not recover artifacts. The appellate court's decision also ensures that salvage operations may continue without direct interference from others, even when the shipwreck is located in international waters.

The Fourth Circuit properly decided that the ocean is large enough to accommodate continued multiple uses of the *Titanic*, including scientific study, photography and the recovery of artifacts. It is clearly in the public's best interest to maintain free and open access to the *Titanic* during the frequent periods when RMST is not conducting salvage operations on site. There is no compelling basis for the Court to overturn this decision.

CONCLUSION

The *Titanic* is not a theme park. The wreck site is the scene of a tragedy and the final resting place of more than 1,500 souls. It should be treated with dignity, studied and explored. In addressing several important issues of maritime law, the Fourth Circuit properly balanced the equities and came to a decision that is fair to all those individuals whose rights are affected by this case.

The Fourth Circuit properly applied the well-settled legal principle that the district court's authority to exercise *in rem* jurisdiction over property does not carry with it a concomitant, derivative power to enter ancillary *in personam* orders over individuals who are not parties to the proceedings and are not located within the court's territorial jurisdiction. The Fourth Circuit also properly found that no precedent exists to support the petitioner's argument that the person who has the legal right to remove artifacts from the wreck site also has the "exclusive right to exploit the wreck" by prohibiting access, exploration and scientific study by others who do not interfere with the recovery of artifacts, and such an extension of traditional salvage rights would be contrary to the purpose of salvage law. There is no compelling basis for the Court to review the decision of the Fourth Circuit. Accordingly, the Court should deny the Petition for Writ of Certiorari.

Respectfully submitted this 21st day of July, 1999.

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No. 98-2058

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IN THE
Supreme Court of the United States

R.M.S. TITANIC, INCORPORATED,
successor in interest to Titantic Ventures,
limited partnership,
Petitioner,

v.

CHRISTOPHER S. HAVER;
DEEP OCEAN EXPEDITIONS, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF IN OPPOSITION OF RESPONDENTS CHRISTOPHER S. HAVER AND DEEP OCEAN EXPEDITIONS

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QUESTION PRESENTED

Whether a federal district court sitting in admiralty may, in an unopposed *in rem* salvage proceeding, issue an *ex parte* order that would, without benefit of pleadings, process, or trial, prohibit every person in the world from visiting a specified area of the high seas or photographing a wrecked vessel that otherwise is open to public view in that area.

PARTIES TO THE PROCEEDING

All parties are listed in the petition, but the roles of most of them are misstated.

The action addressed in the petition is strictly *in rem*. Petitioner R.M.S. Titanic, Inc. (RMST) is the only plaintiff, and the wreck of the *Titanic* is the only defendant. There are no other parties. In particular, there are no *in personam* defendants.

Neither respondent Christopher S. Haver nor respondent Deep Ocean Expeditions (DOE) was a defendant in the district court *in rem* proceedings. Rather, they, along with Wildwings Worldwide Travel, Bakers World Travel, Quark Expeditions, Inc., Mike McDowell, Ralph White, Don Walsh, Alfred S. McLaren, and the *R/V Akademik Mstislav Keldysh*, were merely named as enjoined entities and persons in the "preliminary injunction" from which respondents Haver and DOE appealed to the United States Court of Appeals for the Fourth Circuit. None of them was a party to the *in rem* action in which petitioner RMST filed its motion for a preliminary injunction. Respondent Haver was a counterdefendant in the district court in that petitioner RMST filed a counterclaim in Haver's declaratory judgment action against RMST, which the district court then consolidated "into" the *in rem* action. The district court took no further action on either Haver's complaint or RMST's counterclaim. In recognition of their nonparty status, the court of appeals denominated Haver and DOE "parties in interest-appellants" and denominated the remaining enjoined persons and entities "parties in interest."

Rule 29.6 Disclosure. Respondent Deep Ocean Expeditions is a privately held company incorporated in the British Virgin Islands; it has neither a parent company nor a subsidiary.

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On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF IN OPPOSITION OF RESPONDENTS CHRISTOPHER S. HAVER AND DEEP OCEAN EXPEDITIONS

STATEMENT OF THE CASE

In late 1997 and early 1998, respondent Deep Ocean Expeditions planned, prepared, and marketed Operation Titanic, an expedition to visit, observe, and photograph the wreck of the infamous British ocean liner *RMS Titanic* as she lay on the bottom of the Atlantic Ocean some 325 miles off the coast of Canada. Respondent Christopher S. Haver subscribed to participate in DOE's expedition. Both DOE and Haver realized that petitioner R.M.S. Titanic, Inc. had been declared salvor in possession of the wreck in an *in rem* action in the United States District

Court for the Eastern District of Virginia. Accordingly, they disavowed any intent to conduct salvage operations or interfere with those of RMST. Their activities would be limited to observing and photographing the wreck.

Because they had no claim to the wreck of the *Titanic* or its contents, respondents saw no need to examine the record of RMST's *in rem* salvage action against the wreck and its contents in which, as usual in such cases, only those with such claims had been notified to come forth. Consequently, DOE and Haver were surprised to learn, just a few months before Operation Titanic was to begin, that RMST claimed that the district court had, in its salvage action, granted RMST the right to control access to the wreck and more than 300 square miles of ocean surrounding the wreck.

District Court Proceedings. Soon after respondents discovered RMST's territorial claim, on May 4, 1998, respondent Haver filed a complaint against RMST asking the court that had granted RMST salvage rights to declare that Haver's visiting, observing, and photographing the wreck would not violate RMST's rights. On the same day, RMST moved in its *in rem* action for a "preliminary injunction" against DOE and other nonparties to prevent them from visiting or photographing the wreck. RMST did not file a complaint against DOE and the others; nor did it serve them with process of any kind. RMST later filed an answer and counterclaim in Haver's action and amended its motion for preliminary injunction in the *in rem* action to add Haver as a person to be enjoined. Although RMST, in its counterclaim, sought a permanent injunction against Haver, it did not seek preliminary relief in that action. The district court then *sua sponte* consolidated Haver's action "with and into" RMST's *in rem* action, ordering that Haver's action would "no longer exist as a separate case."

The district court proceeded to hear and determine RMST's motion for a preliminary injunction against DOE, Haver, and others in the *in rem* action, even though Haver was the only person who made an appearance. The court reaffirmed its previous decision that it could exercise *in rem* jurisdiction over the wreck as it lay on the bottom of the Atlantic far beyond the court's territorial limits. It concluded that RMST had properly invoked that *in rem* jurisdiction by bringing a wine decanter from the wreck into court and that RMST therefore had a maritime lien not only on the salvaged decanter but also on the entire unsalvaged wreck and its contents. App. 63. Further the court concluded that RMST had properly executed on its lien by having the decanter and the wreck arrested, even though the marshal's return on the arrest warrant disclosed that it had been "served" by delivering it to RMST's attorney in Norfolk, Virginia. App. 63-64.

The district court determined that it could issue the requested injunction against entities and persons over whom it lacked personal jurisdiction because orders issued in an *in rem* action are effective against the entire world without regard to personal jurisdiction. App. 64. Furthermore, the entire world had been placed on notice by publication when RMST's salvage action had been initiated in 1994, App. 64-65, even though that notice had been addressed only to "any person claiming an interest in the *in rem* defendant," which was described as "the salvage of [the wreck of the *Titanic*]." As for Haver, the court concluded that he had become a party to the *in rem* action when the court had consolidated his declaratory judgment action with and into the *in rem* action. App. 67. In addition, the court found that all entities and persons to be enjoined had received actual notice of RMST's motion for a preliminary injunction, and that

this accorded with Rule 65(a)(1) of the Federal Rules of Civil Procedure, which merely requires "bare notice to the adverse party" before an injunction may be issued. *Id.*

The district court rejected Haver's attempts to demonstrate that his proposed activities would not harm RMST's interests. Citing previous orders (App. 82-86 and App. 87-108) in which the court had granted RMST exclusive rights to visit and photograph the wreck as "law of the case," App. 71, the court issued the requested "preliminary injunction" prohibiting DOE and Haver, among others, from entering the wreck site or photographing the wreck at any time, regardless of whether such activities would interfere with RMST's salvage operations. App. 79-80. The court did not explain what its injunction was preliminary to, there being no further proceedings pending nor any complaint on which further proceedings could be based.

Court of Appeals' Decision. The United States Court of Appeals for the Fourth Circuit reversed, concluding that the district court could not enjoin DOE and Haver from engaging in the only activity they proposed to do: visiting and photographing the wreck of the *Titanic*.

The district court had no authority to enjoin DOE at all, the court of appeals concluded, because neither RMST nor the district court had even made an attempt to obtain personal jurisdiction over DOE. App. 19-20.

The court of appeals held that Haver was subject to personal jurisdiction in the district court, because he had filed an action there on the same subject matter. The court of appeals' further conclusion that the district court's preliminary injunction was properly directed toward Haver was, however, based on its mistaken finding, App. 21, that RMST had sought a preliminary injunction against

Haver in both RMST's counterclaim in Haver's *in personam* action and in RMST's *in rem* action (in which Haver was not a party). The record shows that RMST's motion for a preliminary injunction was filed only in the *in rem* action. It never asked for preliminary relief with respect to its counterclaim in Haver's declaratory judgment action. This error proved inconsequential, however, because the court of appeals ultimately held, App. 40-43, that the district court had no authority to grant RMST either exclusive photography rights or the right to exclude others from a specified portion of the high seas.

REASONS FOR DENYING THE WRIT

Petitioner presents a bold proposition: that a federal district court sitting in admiralty may, in an unopposed *in rem* proceeding, issue an *ex parte* order that would prohibit every person in the world from visiting a specified area on the high seas or photographing an object that otherwise is open to public view in that area. Petitioner asserts that this can be done in a salvage proceeding, in which the plaintiff's only legitimate interest is to seek an award for rescuing property from peril at sea.

The two questions presented by petitioner, like the wreck of the *Titanic*, lie buried beneath a sea of confusion. They cannot be reached without passing through a tempest of procedural and substantive issues, which, though likely dispositive in this case, are of little moment in American jurisprudence. And the destination is not worth the trip: petitioner's ultimate questions involve arcane treasure salvage issues that are hardly among the most important issues facing the federal judiciary.

I. PETITIONER'S SECOND QUESTION IS AN INVITATION FOR THIS COURT TO LEGISLATE.

By its second question, petitioner asks the Court to create a new right for salvors: an absolute right to ex-

clude all others from visiting or photographing a wrecked vessel at any time. Moreover, petitioner suggests that this right may be granted as preliminary relief in an *in rem* proceeding in which prospective vistitors and photographers are not parties and of which they have not even received notice.

Contrary to petitioner's suggestion (Pet. 17-19), this would not be the type of incremental change that has characterized the evolution of the law of salvage. Rather it would, as the court of appeals stated, App. 41-43, be a traumatic change that would distort the salvor's traditional role. Petitioner tips its hand by citing (Pet. 17-19) a number of public policy considerations that it believes support the granting of such a right in cases like this. Respondent could similarly cite a number of public policy reasons for denying such a right. Such appeals, however, should be directed to the legislature. The judiciary is simply unequipped and unauthorized to consider and resolve such public policy debates. Salvors who seek rights beyond those afforded by their traditional maritime lien in salved property must be told to address their petition to the Congress or to those who are engaged in developing treaties on the subject.

Nothing in *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 360-61 (1959), or any other decision of the Court authorizes the federal judiciary to create salvage rights unknown in any other area of the law, especially when the result would, as the court of appeals concluded (App. 41-43), be contrary to fundamental principles of salvage law, copyright law, and the law of the sea. *Cf. Miles v. Apex Marine Corp.*, 498 U.S. 19, 31-33 (1990) (judge-made maritime law must comport with relevant statutes).

II. THE INJUNCTION PETITIONER SEEKS IS NOT AKIN TO THOSE COUNTENANCED IN THE DICTA PETITIONER CITES.

In denying the district court's ability to issue an injunction against nonparties, the court of appeals did not slight any principles endorsed by this Court. The circumstances here are unlike those involved in *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979) and other cases cited by petitioner.

In *Washington State Commercial Passenger Fishing Vessel Ass'n*, nonparty fishermen questioned the power of the district court to subject them to injunctions by which the district court administered a fishery that the state of Washington was unable or unwilling to administer in accordance with applicable Indian treaties. These nonparties were subject to the injunctions because "they, in their common public rights as citizens of the State [of Washington], were represented by the State in those proceedings, and, like it, were bound by the judgment." 443 U.S. at 692 n.32 (quoting *City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320, 340-41 (1958)). In dicta, the Court stated that the fishermen were also "probably subject to injunction under either the rule that nonparties who interfere with the implementation of court orders establishing public rights may be enjoined, *e.g.*, *United States v. Hall*, 472 F.2d 261 (CA5 1972), . . . or the rule that a court possessed of the res in a proceeding *in rem*, such as one to apportion a fishery, may enjoin those who would interfere with that custody. *See Vendo Co. v. Lektro-Vend Corp.*, 433 U.S. 623, 641 [(1977)]." 443 U.S. at 692 n.32 (parallel citations omitted).

The court of appeals' decision at issue here conflicts with neither the holding nor the dicta in *Washington State Commercial Passenger Fishing Vessel Ass'n*. There the

injunction was issued to enforce a judgment after trial. Here petitioner sought a preliminary injunction to foreclose the liberty interest of nonparties without benefit of a complaint, a judgment, or a trial. *Cf. Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, —— U.S. ——, 119 S. Ct. 1961 (1999) (prior to the entry of a money judgment, the district court lacks authority to issue a preliminary injunction preventing the defendant from transferring assets in which the plaintiff claims no lien or equitable interest). There, the nonparties' interest had been fully represented by a defendant in the proceedings; here, petitioner proposes an injunction that could be issued *ex parte* in an unopposed proceeding. Moreover, this case does not involve public rights like those at issue in cases addressing Native American fishing rights and school desegregation. Finally, the preliminary injunction sought by petitioner does not target activity that would interfere with the district court's possession or control of the *res*. Nor does it otherwise affect a property interest in the *res*.

RMST's reliance on *Zych v. SB Lady Elgin*, 1991 U.S. Dist. LEXIS 2962 (N.D. Ill. March 11, 1991), *vacated on other grounds*, 960 F.2d 665 (7th Cir.), *cert. denied*, 506 U.S. 985 (1992), is puzzling at best. The case is an unpublished opinion on an unopposed motion for a preliminary injunction in which the district court committed an error similar to that committed by the district court in this case, except the court there did not create new rights for the salvor. The case has no precedential value.

III. THE ALL WRITS ACT IS INAPPLICABLE.

As the Fourth Circuit held, "It is well established that due process precludes courts from adjudicating *in personam* the rights or obligations of persons in the absence

of personal jurisdiction." App. 17 (citing *Omni Capital Int'l v. Rudolf Wolff & Co.*, 484 U.S. 97 (1987)). It simply makes no sense to contend, as petitioner does, that the All Writs Act trumps the Due Process Clause of the Fifth Amendment and empowers a district court to deprive a nonparty of a substantial liberty interest without benefit of a complaint, a summons, service of process, or a trial. Again, the injunction petitioner seeks has nothing to do with property interest in the *res* before the district court. Petitioner is mistaken when it asserts (Pet. 16) that the Act has been applied to similar situations. Nothing in the cases cited by petitioner supports its position.

In fact, in every case cited by petitioner (Pet. 15-16) in which a court issued an injunction against a nonparty, the injunction was directed toward a plaintiff who had initiated litigation in another court that threatened to frustrate the enjoining court's jurisdiction in an action then pending before that court. Importantly, the injunctions issued in those cases did not purport to adjudicate the rights of the enjoined persons on the merits of the matter. And even in such cases, "the persons enjoined [must] have the 'minimum contacts' that are constitutionally required under due process." *United States v. International Bhd. of Teamsters*, 907 F.2d 277, 281 (2d Cir. 1990). Of course, neither Haver nor DOE have any contacts with Virginia.

Petitioner's suggestion that the All Writs Act may be used to circumvent the Due Process Clause does not warrant review in this Court.

IV. THE QUESTIONS PRESENTED BY PETITIONER CANNOT BE REACHED WITHOUT FIRST ADDRESSING NUMEROUS PROCEDURAL AND SUBSTANTIVE ERRORS.

The questions specified in the petition would not reach the Court in the pristine condition portrayed by the petitioner. In particular, the following procedural and substantive defects would have to be examined before reaching the questions presented by petitioner:

1. The lower courts' conclusion that a salvor has a maritime lien (which is a prerequisite to an *in rem* action) in property that is part of the wreck being salved, but that has not yet been recovered.

2. The lower courts' conclusion that an *in rem* plaintiff may satisfy the requirement, in Supplemental Rule C of the Federal Rules of Civil Procedure, that the *res* be found within the territorial limits of the district by bringing into court a single object from the wreck (here, a wine decanter), while the wreck itself and the remainder of its contents lie well beyond the court's territorial limits at the bottom of the Atlantic Ocean 325 miles off the coast of Canada.

3. The lower courts' conclusion that, contrary to the mandate of Supplemental Rule C of the Federal Rules of Civil Procedure, a court may exercise *in rem* jurisdiction over a *res* that is not, and never will be, within the district.

4. The lower courts' conclusion that an arrest warrant may properly be served by delivering it to the *in rem* plaintiff's attorney, without the marshal's either taking possession of the *res* or affixing a copy of the warrant to the *res*, as required by Supplemental Rule E(4)(b).

5. The district court's conclusion that persons who desired only to visit and photograph the wreck of the

Titanic as it lay on the bottom of the Atlantic some 325 miles off the coast of Canada, had been placed on notice that their interests were at stake in an *in rem* proceeding when the public notice of such proceedings was addressed only to "any person claiming an interest in the *in rem* defendant," which was described as "the salvage of [the wreck of the *Titanic*]."

6. The lower courts' conclusion that a district court may entertain a motion for a preliminary injunction against specified persons and entities who are not parties to the action in which the motion is filed.

7. The district court's refusal to tailor its injunction so as to impose the minimum restriction necessary to prevent interference with the plaintiff's salvage operations.

Even if the ultimate questions submitted by the petitioner were worthy of review, which they are not, the Court could not reach them without first disposing of this list of pedestrian issues.

CONCLUSION

For the foregoing reasons, this Court should deny the petition.

Respectfully submitted,

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No. 98-2058

In The
Supreme Court of the United States

R.M.S. TITANIC, INCORPORATED, successor in interest to Titanic Ventures, limited partnership,

Petitioner,

v.

CHRISTOPHER S. HAVER; DEEP OCEAN EXPEDITIONS,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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ARGUMENT

I. INTRODUCTION

Respondents seek to write out of existence this Court's recognition of *in rem* injunctions. Respondents also seek to obscure the questions presented in the Petition by raising issues unnecessary to the Court's treatment of those questions. Respondents further contend that public policy is best served by allowing anarchy to reign at wreck sites located in international waters, and they seek to minimize the significant safety risks associated with salvage activities at such wreck sites.

II. RESPONDENTS' ATTEMPTS TO EXPLAIN AWAY CLEAR CONFLICTS BETWEEN THE DECISION BELOW AND THIS COURT'S JURISPRUDENCE ARE INEFFECTIVE

Grounds for Non-Party Jurisdiction

Respondents have mischaracterized this Court's opinion in *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n.*, 443 U.S. 658, 692 n.32 (1979). Respondents argued that the nonparty fishermen were subject to *in rem* injunctions because they were citizens of the State of Washington and therefore subject to jurisdiction there. Deep Oceans Expeditions and Christopher S. Haver ("DOE") Opp. at 7; Alfred S. McLaren, Ph.D., Don Walsh, Ph.D., and Ralph White ("MWW") Opp. at 19.[1] In

[1] Petitioner notes that "Respondents" MWW failed to participate in the proceedings of the district court, despite having received timely notice. Although their counsel filed an *amicus curiae* brief with the court of appeals, the brief was actually filed on behalf of The Explorers Club. Therefore, MWW seeks to participate now, for the first time, by filing a separate brief in opposition to the Petition.

fact, this Court's opinion in *Washington* **first** stated the following two alternative grounds (wholly unrelated to their citizenship) for subjecting the nonparty fishermen to jurisdiction: 1) because nonparties who interfere with the implementation of court orders establishing public rights may be enjoined,[2] and 2) because a court possessed of the res in a proceeding *in rem*, such as one to apportion a fishery, may enjoin those who would interfere with that custody. **After** citing these two rules as the basis for its holding, the Court then noted: "[b]ut in any case, these individuals and groups are citizens of the State of Washington, which was a party to the relevant proceedings, and `they, in their common public rights as citizens of the State, were represented by the State in those proceedings, and, like it, were bound by the judgment.'" *Id.* This language makes clear that there are three separate, and independently supportable, reasons for subjecting the nonparty fishermen to jurisdiction. Therefore, contrary to Respondents' assertion, since the first two reasons cited by the Court for subjecting the fishermen to jurisdiction were unrelated to their citizenship, it follows that they were subject to the court's jurisdiction regardless of whether they were citizens of Washington.

Dicta

Respondents also assert that, in *Washington*, the two reasons expressed by the Court for subjecting the nonparty fishermen to jurisdiction, were dicta. DOE Opp. at 7. However, the Court's own language in the *Washington* opinion makes clear that the reasoning was not dicta. The

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[2] The public rights here involve determinations of property rights against the whole world, as well as assuring that historically and archaeologically responsible salvage takes place. Indeed, "the saving of imperiled maritime property" is and always has been in the public interest. Norris, 3A *Benedict on Admiralty* § 1 (7th ed. 1997); App. 77; *see Merchants Nat.Bank v. Dredge Gen.G.L. Gillespie,* 663 F.2d 1338, 1348 (5th Cir. 1981), *cert dismissed* 456 U.S. 966 (1982).

Court stated that "[i]n addition to their challenges to the District Court's basic construction of the treaties, and to the scope of its allocation of fish to treaty fishermen, the State and the commercial fishing association have advanced two objections to various remedial orders entered by the District Court." *Id.* at 692. The footnote immediately after that sentence begins by noting that "[t]he associations advance a third objection as well – that the District Court had no power to enjoin individual nontreaty fishermen, who were not parties to its decisions, from violating the allocations that it has ordered." *Id.* at 692 n.32. The Court stated: "[t]he commercial fishing organizations, on behalf of their individual members, argue that they should not be bound by these orders because they were not parties to (although the associations all did participate as *amici curiae* in) the proceedings that led to their issuance." *Id.*

The Court went on to state that even though the Washington Attorney General represented to the Court that the State would implement the decision of the Court, "the issue is still alive since state implementation efforts are now at a standstill and the orders are still in effect." *Id.* The Court then concluded "[a]ccordingly, we must decide it." *Id.* It was then that the Court said: "[i]n our view, the commercial fishing associations and their members are probably subject to injunction under either the rule that nonparties who interfere with the implementation of court orders establishing public rights may be enjoined [citation omitted], or the rule that a court possessed of the res in a proceeding *in rem*, such as one to apportion a fishery, may enjoin those who would interfere with that custody. [citation omitted]." *Id.*

Dictum (plural of *dicta*) is a shortened form of *obiter dictum*, which means "a nonbinding, incidental opinion on a point of law given by a judge in the course of a written opinion delivered in support of a judgment." On the other hand *judicial dictum* is that "which refers to an opinion by a court on a question that is directly involved, briefed, and

argued by counsel, and even passed on by the court, but that is not essential to the decision." A Dictionary of Modern Legal Usage 275 (2nd ed. 1995); *see Cerro Metal Prods. v. Marshall*, 620 F.2d 964, 978 n.39 (3rd Cir. 1980). The Court in *Washington* stated that it was presented with a question that it "must decide ...." *Washington*, 443 U.S. at 692 n.32. Therefore, the treatment of the *in rem* injunction issue was clearly not *obiter dictum*, and was at the very least *judicial dictum*, which is generally binding. *Cerro*, 620 F.2d at 978 n.39; *Wolf v. Meister-Nieberg, Inc.*, 194 Ill.App.3d 727, 551 N.E.2d 353, 355 (Ill.App.1 Dist. 1990).

Due Process Considerations

Relying on constitutional due process considerations, the Respondents argue that the district court could not issue *in rem* injunctions prohibiting individuals from interfering with the salvage rights awarded in the wreck. DOE Opp. at 8-9; MWW Opp. at 20. The courts and Congress have long recognized that maritime law differs from the common law. *Amstar Corp. v. The Alexandros T.*, 664 F.2d 904 (1981). Congress recognized this distinction when it granted this Court the authority to promulgate maritime procedure rules. *Id.* at 908. The procedures set out in Supplemental Admiralty Rule C for *in rem* arrest provide a means for enforcing a maritime lien. The lien is an aspect of substantive, rather than procedural, maritime law. *Id.* Furthermore, the constitutionality of Rule C must be determined in the light of the "nautical background from which it evolved" and with proper regard for the substantive maritime law it serves. *Id.* at 909.

The *Amstar* court recognized that the fundamental requisites of due process are adequate notice and the opportunity to be heard. *Id.* at 910. The court recognized that it "need not take refuge in the fiction that the vessel is assumed to be a person," and stated that the "personification of the vessel, long accepted in admiralty, should not blind a

court to reality." *Id.* at 911. Since the arrest has an economic effect on the owner, it is the owner who is entitled to adequate notice. *Id.* In the present case, notice was provided by publication, and the only ownership claim asserted was later dismissed.

The *Amstar* court also noted that constitutional notice requirements were not an obstacle to enforcement of Rule C's *in rem* arrest provisions. The court stated that "the answer to this question is found in the substantive law of admiralty which gives a maritime lienor sufficient interest in the vessel to detain it so his lien can be judicially enforced." *Id.* The court then found that Rule C satisfies the requirements of the due process clause, stating that notice prior to arrest would, in many instances, enable the owner to frustrate judicial enforcement of the lien, and therefore the execution of the process by arrest of the vessel is proper. *Id.* Once the arrest is accomplished, the arresting court must be able to issue orders preventing interference with its exercise of jurisdiction over the wreck. That is precisely what the district court did in this instance by issuing an injunction to prevent interference with its adjudication of the pending *in rem* proceeding. When the issuance of that injunction order is considered "in the light of the nautical background from which it evolved and with due regard to the substantive maritime law it serves," the inescapable conclusion is that the court must be able to issue orders to protect its *in rem* jurisdiction and to carry into effect its orders entered in the *in rem* proceeding.

Representation of Non-Parties' Interest

The Respondents also seek to distinguish the facts of this case from *Washington* by arguing that the nonparties in *Washington* were fully represented by a defendant in the proceedings. DOE Opp. at 8. The Respondents appear to have forgotten that Haver fully defended the matter in the district court, and that the same attorney representing him

then proceeded to represent DOE and Haver at the appellate court and here. Moreover, it was DOE's expedition to the wreck in which Haver sought to participate. Therefore, DOE's interests were fully and adequately represented. Even if DOE's interests were not fully represented, the *Washington* opinion provides separate grounds (as discussed above) for its holding.

Possession or Control of Res

Respondents' argue that the injunction at issue does not target activity that would interfere with the district court's possession or control of the *res*. DOE Opp. at 8. However, the district court recognized the need for protection of the salvor from interference from the very beginning. The district court recognized that the existence of dangerous conditions at the wreck site (total darkness, profound depths and great water pressure), and the need for sophisticated technology to reach and view the wreck site, made it undesirable for sightseers to visit the wreck without regard for and deference to the plan of salvage, implemented by the salvor, especially ongoing salvage activities. The district court also recognized that uninformed sightseers would disturb the wreck site, App. 68-69, 84, and this danger is further highlighted by the fact that the previous photographic exhibitions to the wreck by the P.P. Shirshov Oceanographic Institute created dangerous conditions for submersible passengers and caused damage to the wreck itself. In fact, during the 1996 expedition, RMST discovered the propeller protector of one of the two P. P. Shirshov *MIR* submersibles lodged in the wreck. App. 69 n. 11.

III. THE ALL WRITS ACT APPLIES TO RESPONDENTS

The Respondents argue that the All Writs Act does not apply in this case because there is no jurisdiction over them. DOE Opp. at 9. However, this argument ignores the holding of this Court in *Washington*. The Respondents argue that the All Writs Act may not be used to circumvent the Due Process Clause, and they cite *United States v. International Bhd. Of Teamsters*, 907 F.2d 277, 281 (2nd Cir. 1990) in support of that argument. However, a close reading of *International Bhd. Of Teamsters* reveals that there is no conflict. In that case, the court simply stated "all we hold is that if jurisdiction over the subject matter of and the parties to litigation is properly acquired, the All Writs Act authorizes a federal court to protect that jurisdiction even though non-parties may be subject to the terms of the injunction." *Id.*

Assuming, as we must, that the *International Bhd. Of Teamsters* court was aware of this Court's holding in *Washington*, there can be no conflict between the two rulings. Accordingly, since this Court described, in *Washington*, how proper jurisdiction over the parties can be acquired in cases like this, there is no bar to application of the All Writs Act.

IV. RESPONDENTS' ATTEMPTS TO LIMIT THIS COURT'S JURISDICTION IN ADMIRALTY AND MARITIME MATTERS ARE WITHOUT SUPPORT

It is surprising that Respondents cite to *Miles v. Apex Marine Corp.*, 498 U.S. 19, 31-33 (1990) for the proposition that federal courts are not authorized to determine the bounds of salvage rights. DOE Opp." at 6. In *Miles*, 498 U.S. at 31, this Court specifically reiterated that it is appropriate for federal courts to supplement federal admiralty law, as long

as Congress has not spoken directly to the question. This same proposition was recognized by this Court in *Romero v. International Term. Co.*, 358 U.S. 354, 360-61 (1959). In discussing the power conferred upon the Supreme Court in Article III of the Constitution, the Court stated that:

> Article III impliedly contained three grants. (1) It empowered Congress to confer admiralty and maritime jurisdiction on the "Tribunals inferior to the supreme Court" which were authorized by Art. I, § 8, cl. 9. (2) It empowered the federal courts in their exercise of the admiralty and maritime jurisdiction which had been conferred on them, to draw on the substantive law "inherent in the admiralty and maritime jurisdiction," *Crowell v. Benson*, 285 U.S. 22, 55, and to continue the development of this law within constitutional limits. (3) It empowered Congress to revise and supplement the maritime law within the limits of the Constitution. *See Crowell v. Benson, supra,* at 55.

Romero, 358 U.S. at 360-61.

This Court has also recognized that the exact kind of question here presented is appropriate to federal courts. In *Romero* the Court noted that Section 9 of the First Judiciary Act granted the District Courts maritime jurisdiction, and that "it was recognition of the need for federal tribunals to exercise admiralty jurisdiction that was one of the controlling considerations for the establishment of a system of lower federal courts." *Id.* The Court also noted that, in The Federalist, No. 80, Hamilton wrote that "[t]he most bigoted idolizers of State authority have not thus far shown a disposition to deny the national judiciary the cognizances of maritime causes" which "so generally depend on the laws of

nations, and so commonly affect the rights of foreigners, that they fall within the considerations which are relative to the public peace" and the "most important part of them are, by the present Confederation, submitted to federal jurisdiction." *Id.* at 361, f.n. 8. Therefore, it is appropriate for this Court to determine the bounds of salvage law.

V. RESPONDENTS ARGUE THAT COURTS SHOULD NOT RESTRICT ACCESS TO SHIP WRECKS IN INTERNATIONAL WATERS

The Respondents argue that the public benefits by having unfettered access to shipwrecks lying in international waters. MWW Opp. at 25. This myopic view ignores the likelihood of looting of shipwrecks and the significant risk of confrontation on the high seas. Indeed, RMST has already dealt with one such confrontation in which the district court enjoined another diving group from interfering with RMST's efforts. App. 82. Also, while Respondents note the existence of only five manned submersibles capable of reaching the wreck, they fail to advise the Court that numerous commercial enterprises operate unmanned remotely operated vehicles (ROV) which are capable of reaching, photographing and salvaging the wreck.[3]

CONCLUSION

The Respondents fail to grasp the essential point of the Petition. The district court issued its injunction in an ongoing *in rem* proceeding. In that proceeding, the district court recognized that portions of the wreck had been brought before it; required notice to the world of its intention to hear claims to the wreck; adjudicated ownership to the wreck,

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[3] The district court enjoined a salvage operation to the wreck, employing just such an ROV, in September, 1992. *See Marex Titanic v. Wrecked and Abandoned Vessel*, 805 F.Supp. 375, 377 (E.D.Va. 1992), *rev'd*, 2 F.3d 544 (4th Cir. 1993).

conditioned on continuing salvage activities (as the law of salvage requires); conferred a status – that of salvor in possession – on the petitioner; and issued orders to protect the exercise, at the wreck site, of all rights emanating from salvor in possession status. The district court's decision conformed to generally accepted principals of international salvage law and served to protect a salvor who was acting in a responsible manner, appropriate to the historical and cultural significance of the wreck. The court of appeals failed to fully recognize the wisdom of the district court's decision. The decision of the court of appeals, if it stands, will result in piecemeal litigation around the world, presenting the risk of inconsistent results. It was for this reason that Professor Thomas J. Schoenbaum recently stated in his hornbook on admiralty law, at Section 16-7, pg. 337, that:

> There is a growing consensus that U.S. courts should assume jurisdiction over shipwrecks in international waters. Extraterritorial jurisdiction is justified on the basis that this is the only way to preserve wrecks that are often of extreme historic interest from plunderers, to protect the right of the first salvor, and to return the property concerned to economic usefulness.

The district court recognized these risks and conferred a status subject to review and modification, dependent on the prosecution of continuing salvage activities. The district court's decision to protect the status using an *in rem* injunction is appropriate under the circumstances and *in personam* jurisdiction should not be necessary to protect the status.

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